Supreme Court
F I L

No. 94-941299

JAN 26 1995

IN THE OFFICE OF THE CLERK

United States Supreme Court

THE SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation, and BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, CHARLES MCKENNA, ROBERT ADLER, NANCY ALBERT, LINDA SHER, AND JOLYNN WEINER,

Petitioners,

vs.

THE GOOD NEWS/GOOD SPORTS CLUB, an unincorporated association, JORDAN HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, PAT CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER, and L. CORBETT HEIMBURGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT MCCLINTOCK
Counsel of Record
705 Olive Street
St. Louis, Missouri 63101
(314) 241-5673

MARC D. STERN
15 East 84th Street
New York, New York 10028
(212) 360-1545

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QUESTIONS PRESENTED

I. Is a showing of unconstitutional viewpoint discrimination made out without a showing that the governmental owner of a non-public forum bears any animus against the excluded speech or speaker?

II. Is the exclusion of all religious speech from a non-public forum permissible subject matter distinction or viewpoint discrimination?

III. Should this Court's holding that secondary school students can distinguish between school-sponsored and privately-sponsored religious speech be extended to elementary school students.

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E. SCHOOL DISTRICT OF THE CITY OF LADUE USE OF PREMISES POLICY (July, 1992)

Petitioners Ladue School District and several of its officials[1] petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 28 F.3d 1501 (8th Cir. 1994) and is reprinted at Appendix A. The order denying rehearing and rehearing *en banc* is reproduced at Appendix B. The District Court's opinion is reported at 859 F.Supp. 1239 (E.D. Mo. 1993) and is reprinted at Appendix C.[2]

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1. The Petitioners are: the School District of the City of Ladue, Charles H. Cobaugh, Joyce Follman, Robert Adler, Nancy Albert, Linda Sher, JoLynn Weiner, Ann Boon and Charles McKenna. Adler, Albert, Sher and Weiner are added as Petitioners pursuant to S.Ct.R. 35.3. Minkler and Sacks are no longer members of the Board, but are petitioners here since they were sued in an individual capacity.

The Respondents are: the Good News/Good Sports Club, Jordan Heimburger, Christopher Hirt, David Hirt, Comfort Ibe, Peggy Hirt, John Hirt, Susan Mallory, George Mallory, Larry Tychsen, Dawn Huffman, Gabor Csengody, Pat Csengody, Afocha Ngozi Ibe, Kathryn Heimburger and L. Corbett Heimburger.

2. Page citations are to each appendix separately, *e.g.*, App. A-1, App. B-5.

JURISDICTION

Jurisdiction in this Court rests on 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on July 12, 1994. A timely petition for rehearing and rehearing *en banc* was denied on September 29, 1994. On December 7, 1994, Justice Thomas signed an order extending the time to file a petition for certiorari to and including January 27, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . .."

School District of the City of Ladue Use of Premises Policy (Adopted July, 1986) (reproduced at Appendix D).

School District of the City of Ladue Use of Premises Policy (Adopted July, 1992) (reproduced at Appendix E).

STATEMENT OF FACTS

In the early 1980's, Jane Cunningham and several other parents in the Ladue School District organized an after-school religious club for 3rd, 4th and 5th grade students. The Good News/Good Sports Club ("Club"), as it came to be called, provided an after-school activity with a distinct religious content. Students and their families provided their own transportation to Club meetings, which took place in private homes.

In 1986, the School District of the City of Ladue (hereafter "District")[3] adopted a policy (hereafter "1986 Use Policy") allowing community groups to use District facilities with no distinction between groups. [Appendix D]. All community groups were free to seek permission to use available space in school buildings at any time, even when

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3. For convenience sake, the District and those of its officials who were named as defendants are referred to as "the District", and the plaintiffs, Good News/Good Sports Club, its members and their parents, are called collectively "the Club."

school was in session. Groups could not interfere with any school sponsored activity. [App. D-1].

In 1988 and 1989, Jane Cunningham (who in 1989 became a member of the Ladue Board of Education) filed applications on behalf of the Club seeking permission to meet at Ladue Junior High School.[4] The applications, which did not disclose the Club's religious activities, were granted.

In the year before the events leading to this lawsuit, the Club, now appealing to 6th through 8th grade students, met at the Ladue Junior High School from the end of school at 3:00 p.m. until approximately 3:55 p.m., when participants would catch a school bus home. This bus was intended for students participating in school-sponsored after-school activities, but Club members were allowed to ride it as well. Meeting notices were distributed to students by mail. Each bore a notation that the Club was not sponsored by the

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4. Ladue Junior High School includes only 6th, 7th and 8th grades and is classified as an elementary school under Missouri law. 160.011(2) R.S.Mo. (1986).

School District. Parental consent was required for participation.

In anticipation of the 1991-1992 school year, an application for access on the Club's behalf was filed by L. Corbett Heimburger, a parent of a child in the District. The District Court found that by 1992 school officials were aware of the Club's religious character. [App. C-7]. The requested permit was granted.

Later during that school year, parents complained to the School Board that their children were being solicited both in school and elsewhere to join the Club, and they demanded a re-examination of the 1986 Use Policy. The Board directed its attorney to study that policy and to make recommendations concerning it. It also adopted a resolution permitting all groups then using its facilities to continue to do so for the remainder of the school year.

The District's attorney reported that, because elementary students were in the building participating in

school-sponsored activities during the period immediately after instructional time, it was possible that the 1986 Use Policy would allow for uses of District facilities which would violate the Establishment Clause. He also noted that the Policy required the District to make facilities available to all community groups, including extremist groups, during that time.

After months of public comment, during which the Club and others expressed their views, the Board adopted a new policy ("Amended Use Policy"). At no time during its reconsideration of the use policy did any member of the District's Board, its staff or its attorney express any intent to shut down the Club, silence its religious viewpoint, or otherwise disadvantage it.

Because a substantial number of students remained at school after the end of instructional time to engage in school related activities, some of which were curriculum related, the Amended Use Policy generally reserved the buildings for

those activities between 3:00 p.m. and 6:00 p.m. on school days. With only two specified exceptions, no outside group could use school facilities during these hours. After 6:00 p.m., any group, including the Club, could use District facilities.

The two exceptions to the ban on community use during the 3:00-6:00 p.m. period were athletic programs and those scouting programs with which Ladue School District had long cooperated. Scouting groups had access limited to activities prescribed for scout programs provided that they engaged in no religious activities.

The Club filed an application to use school facilities during the after-school hours for the 1992-93 school year. This application was rejected pursuant to the Amended Use Policy.[5]

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5. Consistent with this Court's observation in *Perry Education Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) that a school district could deny use of its facilities to all non-school groups, the District amended its Amended Use Policy after the decision of the Court of

(continued...)

STATEMENT OF THE CASE

I. DISTRICT COURT

The Club, several of its members (through best friends), and several of their parents filed suit in September, 1992, challenging the Amended Use Policy. Jurisdiction rested on 28 U.S.C. § 1331.

The Club first unsuccessfully sought a temporary restraining order enjoining implementation of the new policy. After a brief discovery period the motion for a preliminary injunction was combined with the trial on the merits in November 1992. The Club claimed several constitutional violations. First, it alleged that the Amended Use Policy violated its rights under the Free Speech Clause. This claim in turn had several parts: (1) a claim that the Amended Use Policy denied access to a designated public forum on the

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5.(...continued)
Appeals to exclude all groups, including scouts, from its facilities until 6:00 p.m. on school days, pending final resolution of this lawsuit. Petitioners understand that the Club continues to meet in private homes.

basis of content;[6] and (2) a claim that the District acted with an unconstitutional motive when it adopted the Amended Use Policy. A second count alleged a denial of rights under the First Amendment's Religion Clauses.

The District Court (Edward L. Filippine, C.J.) upheld the Amended Use Policy. The centerpiece of the Court's opinion was *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983), in which this court held that a school district which allowed a certified bargaining agent access to its internal mail system need not grant similar access to a rival union as long as it had reasonable justification for excluding the rival.

The District Court found that the District's justifications for closing the limited public forum prior to 6:00 p.m. on school days, specifically the possibility of an Establishment

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6. The Club also alleged an 'overbreadth' violation of the scouting groups' rights because of the Policy's restriction on their religious speech. The Court found that the Club lacked standing to challenge this proviso. This claim was abandoned on appeal.

Clause violation and the concern that "large numbers of religious, political or philosophical groups might seek access to school facilities while students were still present for school-related activities" [App. C-15], were both reasonable.

The court also held that the Amended Use Policy did not establish a designated forum merely because scout and athletic groups were allowed some limited access to the forum. It pointed out that the non-public forum in *Perry* was accessible to some community groups (including scouts) in addition to the recognized union. Reviewing the District's policies in light of *Perry*, the court found that the access the Amended Use Policy granted scouting groups did not create a designated public forum between 3:00 and 6:00 p.m. [App. C-15-17].

The District Court acknowledged that even in a non-public forum only reasonable distinctions between groups seeking access were permissible. However, it found that granting scouts preferred access to the District's non-public

forum was reasonable because their activities were compatible with the purposes of public education and the District and Scouts had a long history of cooperation. [App. C- 7-8].

After citing the requirements established in *Perry* and *Cornelius v. NAACP Legal Defense and Education Fund Inc.*, 473 U.S. 788 (1985) that regulations of non-public government property must not suppress expression "merely because public officials oppose the speaker's views", *Perry*, 460 U.S. at 46, must not be a "mere pretext for viewpoint discrimination", *Cornelius*, 473 U.S. at 797 and must not "conceal a bias against the viewpoint advanced by the excluded speakers", *id.*, 473 U.S. at 812, the District Court rejected the claim that the District had acted with a discriminatory motive or animus in adopting the Amended Use Policy and that the essential reasonable justification for restrictions on access were mere pretexts:

> The court further finds that no evidence supports plaintiffs' contention that the School Board acted with the intent to destroy the Club because of its religious activities . . .. The Court finds no credible evidence to support a finding that the School Board acted with an unconstitutionally discriminatory motive in amending the Use Policy.

[App. C-29].[7]

Although the District Court found the Amended Use Policy did not create a designated public forum, it nonetheless went on to address the Club's claim that, if such a forum existed, its rights were violated. Pointing again to *Perry*, the Court observed that the Club's rights would have been violated only if it could prove that it was "similar in character" to the Scouts. (The Club did not contend that access for athletic groups conferred on it an access right.) The court found that the secular scouting program was in fact

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7. The District Court also rejected the Club's assertion that requiring it to meet after 6:00 p.m. would destroy it. [App. C-25-26]. It noted that other groups serving students met successfully at that hour and that students had participated in the Club when it met in private homes at 5:30 p.m. It also noted that if the Club were to meet in private homes immediately after school, school buses would bring students directly to those homes, further reducing the burden on the Club. [App. C-7].

not similarly situated with the overtly religious Club, such that even if the Amended Use Policy were a designated public forum, granting access to the Scouts did not compel the District to grant the Club access. [App.C-30-33].

On largely the same grounds, the District Court also rejected the Club's religion clause arguments.

II. COURT OF APPEALS

A. Majority Opinion

A divided Eighth Circuit reversed. It did not find clearly erroneous Judge Filippine's factual finding that the Amended Use Policy did not create a designated public forum. Also left intact were the factual findings that the District had not acted with the specific intent of silencing or discriminating against the Club's religious viewpoint, and that the Club could meet successfully after 6:00 p.m.

The majority in the Court of Appeals did reject the animus standard for viewpoint discrimination applied by the

trial court.[8] It applied instead an "effects" test to determine whether viewpoint discrimination existed.

> The Club need not establish that the School District opposed the Club's viewpoint; rather, the Club need only demonstrate that the Amended Use Policy allowed the Scouts to express their viewpoint on moral and character development but prohibited the Club's religious viewpoint.

[App. A-14-15].

The Eighth Circuit accepted the Club's argument that since both it and the Scouts were dedicated to the moral development of youth, and were distinguished only by the Club's religious orientation, the two groups had to be treated identically for access purposes absent compelling justification. [App. A-12-13].

The panel's majority gave two additional reasons for finding viewpoint discrimination irrespective of whether the District opposed the Club's viewpoint on the moral

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8. The majority held that the Club had not waived its viewpoint discrimination claim by failing to pursue it in the District Court.

development of youth. First, the majority found viewpoint discrimination by attributing to the District Court a finding which that court did not make, namely that "the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from 3 to 6 p.m. on school days . . . ." [App. A-15]. Second, the majority found further proof that the District was guilty of facial viewpoint discrimination because its policy prohibited the scouts from engaging in religious speech or activities. [App. A-16].

The Eighth Circuit next considered whether the District had a compelling interest justifying the allegedly discriminatory treatment. It apparently assumed that, but for the District's interest in avoiding a full-fledged violation of the Establishment Clause, the earlier use policy would have remained in effect. Since under the earlier policy the Club would have been entitled to access after 3 P.M., the Court treated the case as if the question to be decided was whether the prior Use Policy countenanced unconstitutional aid to

religion. It concluded that it did not, and hence that the District had no compelling interest in revising the Use Policy and excluding the Club from the 3-6 P.M. period. [App. A-16-23].[9]

Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 621 (1971), the Eighth Circuit held that opening a designated public forum to both religious and secular speech had a valid secular purpose. [App. A-18]. It also held that allowing all groups to meet during the after school hours minimized entanglement with religion, since that policy would eliminate the need to monitor a group's speech. [App. A-23].

The majority found that granting religious clubs access when sixth through eighth grade students were attending school-sponsored activities would not impermissibly advance religion. It noted, first, that the Club would not dominate

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9. The Court of Appeals reached this conclusion even though the Club had not challenged the District's authority to close the forum. Cf. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n.*, 460 U.S. 37 (1983).

the forum. [App. A-19]. Second, it concluded that elementary school students were capable of distinguishing between school sponsored religious speech and non-school sponsored religious speech, thus extending the holding in *Westside Community School v. Mergens*, 496 U.S. 226 (1990) that secondary school students could make that distinction to Ladue's younger elementary school students. [App. A-20].

Third, the Court rejected the argument that the timing of the meetings after school, when the compulsory education laws brought an audience together, impermissibly advanced religion.[10] [App. A-21].

In light of the Court's holding on the free speech claim, it did not reach the Club's religious clause arguments.

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10. The majority also rejected the argument that because the Club had been organized and led by a one-time member of the School Board, the District had legitimate reason to be concerned with the possibility of its appearing to endorse the Club. [App. A-21-22].

B. Dissenting Opinion

Senior Circuit Judge Bright dissented, disagreeing with the majority on three crucial points. First, Judge Bright would have held that the claim of viewpoint discrimination depended on a showing of an animus towards the Club's speech. In light of the District Court's factual finding that no such animus existed [App. C-29] -- a finding not challenged by the majority -- Judge Bright suggested that the School District needed only a reasonable, not compelling, justification for excluding the Club. [App. A-30-31].

Second, Judge Bright asserted that the School District legitimately feared endorsing religious activity in the immediate after-school period, particularly with regard to children as young as 11-year old sixth graders. This fear provided a reasonable justification for the Amended Use Policy.[11] [App. A-32-38].

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11. Judge Bright noted that the District could legitimately change its policy in advance of actual disruption caused by use of the forum by extremist groups. [App. A-38-41].

Third, Judge Bright agreed with the District Court that the Scouts and the Club were not similar in character, such that, even if a designated public forum existed under the Amended Use Policy, access for the Scouts did not require identical access for the Club. [App. A-38-40].

A timely petition for rehearing and rehearing *en banc* was denied on September 29, 1994, Judge McMillian dissenting. [App. B-1].

REASONS FOR GRANTING THE WRIT

This case presents three questions, each of which merits consideration by this Court. The first question is whether this Court's settled rule prohibiting viewpoint discrimination in a non-public forum is, as held in *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1982) and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1988), predicated upon a showing of animus toward the excluded speech or speaker.

The second issue this case presents is identifying what one court has labelled the "elusive difference" between permissible subject matter distinctions and unconstitutional viewpoint discrimination as applied to all religious speech in a non-public forum. That issue was presented, but not resolved, in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993).

Third, this case presents the question of whether the rule that secondary school students can distinguish between school-sponsored and privately-sponsored religious speech should be extended to elementary school students.

I. VIEWPOINT DISCRIMINATION REQUIRES A SHOWING OF ANIMUS

A. Animus Is An Essential Element Of A Viewpoint Discrimination Claim

The differing judgments of the Court of Appeals and the District Court are attributable to different responses to the question of whether impermissible viewpoint discrimination exists only when there is a deliberate intent to silence a

particular point of view, the position of the District Court [App. C-29] and the dissenting judge [App. A-30-31]; or whether a showing of such animus is unnecessary, the position of the Court of Appeals majority [App. A-14-15].

The District Court found that Petitioner Ladue School District had not denied the Club access to the premises intending to silence its religious message. [App. C-29]. That finding was challenged on appeal [Appellant's Brief in the Court of Appeals at 16-19], but the Court of Appeals did not set it aside as clearly erroneous.[12] Nevertheless, that court held that the District had practiced viewpoint discrimination.

The position of the Court of Appeals that "viewpoint discrimination" can exist without any intent to silence a

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12. We discuss below that Court's finding that because the decision to re-examine the Access Policy was set in motion by objections to the Club the resulting Amended Use Policy was necessarily tainted with viewpoint discrimination [p. 28, *infra*].

disfavored point of view is startling. That position is also at odds with this Court's decisions.

Perry Education Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983) involved access to a school mail system. The school allowed the union certified as the bargaining agent for its staff access to its internal mail system. A handful of other groups, including several scout programs, were also given access to the mail system. Identical access was denied to another union seeking to represent school employees.

After holding that the mail system was neither a traditional or designated public forum, this Court held that the school was not guilty of viewpoint discrimination against the competing union because "there is . . . no indication that the School Board intended to discourage one viewpoint and advance another." (emphasis added). 460 U.S. at 957.

By the Court of Appeals' lights, *Perry* was wrongly decided. The two unions seeking access were distinguishable only by different ideas concerning employer-employee

relations. Permitting one union access but not the other should have constituted viewpoint discrimination. This Court held that it did not.

When this Court next considered viewpoint discrimination, it was again careful to describe it as an intentional silencing of a disfavored point of view:

> While we accept the validity and reasonableness of the justifications offered by petitioner . . . those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view.

Cornelius v. NAACP Legal Defense and Education Fund Inc., 473 U.S. 788, 811 (1985) (emphasis added).

The Eighth Circuit thought *Lamb's Chapel v. Center Moriches School District*, *supra*, dispositive because in that case this Court had found deliberate discrimination against a religious viewpoint when that viewpoint was excluded from a non-public forum. It suggested that *Lamb's Chapel* was inconsistent with *Cornelius* and *Perry* in this regard. [App. A-14].

Lamb's Chapel involved a specific anti-religious animus. The district there admitted that the Chapel would have been granted access (along with a multitude of other groups) to discuss family issues but for the religious viewpoint it sought to express on that subject being debated within the forum. In that case, unlike in this one, all viewpoints on the subject of the family except religious ones were given access to the forum. Lamb's Chapel was denied access because of its religious views.

No wide spectrum of views on child rearing was being expressed in Ladue's facilities from 3:00 to 6:00 p.m. The Club was not excluded from Ladue's facilities because of its religious views, as Lamb's Chapel was from Center Moriches' facilities.[13] It would have been excluded had it been wholly secular. The Club was, in short, excluded because the forum was closed and it had no independent right

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13. The Club had access to school facilities during evenings and on weekends, the very access denied Lamb's Chapel.

of access. The Scouts were not granted preferred access because of their views on child development, whether secular or religious, but because of their long history of use of Ladue's facilities and because scout activities were thought uniquely compatible with the purposes of public education. Its religious perspective did not lead to the exclusion of the Club from District facilities from 3 p.m. to 6 p.m.

In non-public forum cases, this Court has insisted on a showing that a group was excluded "because of, not despite" its viewpoint in order to make out a claim of viewpoint discrimination. Cf. *Feeney v. Personnel Administrator*, 442 U.S. 256 (1979) (scienter a requirement of Equal Protection Clause violation). In contrast with these decisions, the Court of Appeals held the School Board's indifference to the Club's viewpoint irrelevant.

What mattered for the Court of Appeals was that there was in fact an ideological difference between the Club and the Scouts which was affected differentially by the Board's

Amended Use Policy, even though that ideological difference played no role in the District's decisionmaking. It is impossible to square that holding with this Court's broad pronouncement in *Perry* that "implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." 460 U.S. at 49. On the Court of Appeals' view, each such exclusion would be viewpoint discrimination. This Court should decide which of these inconsistent understandings of viewpoint discrimination is correct.

The Eighth Circuit is not alone in dispensing with animus with regard to viewpoint discrimination in non-public fora. The First Circuit recently held that "regardless of actual motivation, grave damage is done if the government . . . even appears to be discriminating [on the basis of viewpoint]." *AIDS Action Committee v. Mass. Bay Trans. Auth.*, 1994 W.L. 612815 *12 (1st Cir. 1994) (emphasis added). Together, the decisions of the Eighth and First

Circuits demonstrate that this Court needs to clarify the standard for proving illicit viewpoint discrimination.

B. The Fact That The Club's Presence "Caused" A Re-examination Of The Access Policy Is No Substitute For Animus

Dispensing with an animus requirement led the Court of Appeals to substitute a different test, one that held viewpoint discrimination existed as a matter of law if the District's decision to reconsider its access policy could be traced to complaints about the Club, even absent anti-Club animus on the part of the District in deciding on a new access policy. [App. A-15]. Given the Eighth Circuit's departure from fundamental rules of public forum analysis, it is not surprising that this revised test is also inconsistent with controlling precedent.

Cornelius considered the constitutionality of rules excluding "advocacy groups" from the combined federal campaign. The rules were adopted in response to the refusal of numerous employees to participate in the campaign given

the participation of those advocacy groups. That refusal led to a new "examination . . . and eventual adoption[14] of the new rules for the campaign which led to the exclusion of advocacy groups.

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14. The quoted language is from the Opinion of the District Court [App. C-27], cited by the Court of Appeals [App. A-15] for the proposition that because adoption of the Amended Use Policy could be traced to complaints about the Club, viewpoint discrimination existed.

The Court of Appeals was purporting to "affirm" a District Court finding that "the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from its premises from 3-6 PM on school days." [App. A-15]. The District Court made no such finding. Instead, it found:

> Plaintiffs contend that the sole reason defendants amended the Use Policy was to oust the Club from meeting in school facilities and to destroy the Club. Plaintiffs presented evidence, as did defendants, that criticism from some members of the community about the religious nature of the Club was the catalyst for amending the Policy. The Court finds that the citizen comments and complaints about the Club were the primary factor leading to the School Board's examination of the 1986 Use Policy and eventual adoption of the Amended Use Policy. <u>This finding, however, does not mean that the School Board engaged in unconstitutional discrimination in closing the school facilities immediately after school</u>. (emphasis added)

[App. C-27].

The Court of Appeals thus confused the question of whether the Club's presence touched off a re-examination of the Access Policy -- undoubtedly the case -- with the very different question of whether the District harbored an animus against the Club when it adopted the new policy, which the District Court explicitly held it did not. [App. C-29]. The Court of Appeals did not question this latter finding. Indeed, it appears to have accepted it. [App. A-14-15] .

Without acknowledging *Cornelius*, the Eighth Circuit found viewpoint discrimination from the fact that the controversy elicited the School Board's re-examination and amendment of its access policies in order to avoid possible disruption and controversy. That holding cannot be reconciled with *Cornelius*, in which this Court held, 473 U.S. at 811, that in that non-public forum, "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a non-public forum and hinder its effectiveness for its intended purposes" and that the government "need not wait until havoc is wreaked to restrict access", *id.* at 810.

Moreover, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a case which the Court of Appeals did not discuss, this Court took special notice of the need for school boards to distance themselves from any suggestion of support for controversial speech in non-public fora they maintain. The decision below denies schools that power,

since its exercise would inexorably constitute viewpoint discrimination in the Eighth Circuit's view.

The trial court, aware that the District was responding to complaints about the Club's presence when it initiated a review of its guidelines, nevertheless concluded that the District was motivated not by anti-Club animus or an anti-religious bias, but by a determination to avoid controversy over the use of school buildings in the immediate period after formal instruction ended. That factual finding was not set aside by the Court of Appeals. Unless *Cornelius* and *Hazelwood* apply only when the exclusion takes place before a controversy erupts (in any event not the case in *Cornelius*), that finding should have excluded the possibility of viewpoint discrimination.

The problem with the Eighth Circuit's substitution of a causation rule for an animus one is not just a conflict with decisions of this Court. If broadly followed, governmental owners of designated public forums could learn from

experience only at their own peril. Having created a designated forum or allowed limited access to a non-public forum, they could not close it in response to problems resulting from the actions of a particular speaker without bearing the heavy burden of deflecting a charge of viewpoint discrimination by that speaker, a rule inconsistent with this Court's decision in *Cornelius, supra.* Cf. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding time, place and manner restrictions imposed after complaints about speaker).

A rule inexorably labelling as viewpoint based any regulation adopted in response to actual events, abuses or problems is a rule requiring governmental prescience, not prudence. As Judge Bright noted in dissent, the safest advice counsel can offer the owner of a non-public forum in the Eighth Circuit is to hermetically seal the forum, advice which diminishes the quantity of speech in non-public forums. [App. A-47] *U.S. v. Kokinda*, 497 U.S. 720, 733

(1990), however, instructs courts to be chary of interpreting forum analysis so as to discourage government from allowing as much speech as possible in a non-public forum.

II. THE "ELUSIVE" DIFFERENCE BETWEEN SUBJECT MATTER DISTINCTION AND VIEWPOINT DISCRIMINATION IN A NON-PUBLIC FORUM NEEDS CLARIFICATION

The Court of Appeals' majority held that all distinctions between religious and non-religious speakers are viewpoint based. Thus, that Court concluded that the distinction between the Scouts and the Club was viewpoint discrimination and not subject matter distinction permissible under *Perry* and *Cornelius*.

Had the District modified its 1986 policy by excluding all religious groups while permitting all other community groups, the Eighth Circuit's holding might be defensible. It would find support in *dicta* in *Lamb's Chapel*, *supra*, 113 S.Ct. at 2147-48, a decision the Eighth Circuit regarded as departing from earlier decisions permitting content based

distinctions in a non-public forum, particularly *Perry* and *Cornelius*. [App. A-14].

But this is a view in direct conflict with the specific holding in *Lamb's Chapel*, a decision which purported to be consistent with the very decisions the Eighth Circuit seems to have regarded as superseded by it. It is likewise flatly at war with the exact holding of that case, and with the Second Circuit's interpretation of the subject matter/viewpoint distinction, which regards the exclusion of all religious speech from even a designated public forum as permissible subject matter distinction. *A fortiori* for the Second Circuit it would be permissible in a non-public forum to distinguish between religious and non-religious speech. See *e.g.*, *Lamb's Chapel v. Center Moriches School Dist.*, 959 F.2d 381 (2d Cir. 1992), rev'd on other grounds, 113 S.Ct. 2141 (1993); *Deeper Life Christian Fellowship v. Bd. of Educ.*, 852 F.2d 676 (2d Cir. 1991).

Lamb's Chapel's facts are particularly instructive in light of this Court's holdings in *Perry* and *Cornelius* that there is a difference of constitutional magnitude between permissible subject matter distinctions and illicit viewpoint based discrimination.

New York Education Law § 414 permitted school boards to make unused space in public school buildings available to all community groups except religious ones. Lamb's Chapel challenged this statute as unconstitutional on its face, alleging unconstitutional viewpoint discrimination. The Second Circuit rejected the Chapel's equation of the exclusion of religious speech with viewpoint discrimination, instead labelling it a permissible subject matter distinction. 959 F.2d at 387.

It was to resolve these conflicting characterizations of New York's exclusion of religion under § 414 that this Court granted *certiorari*. 113 S.Ct. at 2147. But because this Court found evidence of viewpoint discrimination in the

application of the statute by the Center Moriches School District, it did not resolve the question for which it had granted *certiorari* -- the facial constitutionality of a rule drawing a distinction between religion and other subjects of discussion in a non-public forum. That question was worthy of this Court's attention two years ago. It merits its attention again now in this case.

Because it is so difficult to precisely locate the line between subject matter distinctions permissible in a non-public forum, see, *e.g.*, *Cornelius* and *U.S. v. Kokinda*, *supra*, and impermissible viewpoint discrimination, *Lamb's Chapel*, *supra*, review here is warranted. Recently, one federal district judge understandably labelled the distinction between the two categories "elusive", *Grossbaum v. Indianapolis-Marion County Building Authority*, 1994 W.L. 668265 (S.D. Ind. 1994), app. pending (7th Cir. 1995).[15]

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15. See also, *Hedges v. Wauconda Community School Dist.*, 118, 9 F.3d 1295, 1297-98 (7th Cir. 1993) (in one paragraph referring to the (continued...)

Presumably, although not certainly, the distinction between subject matter distinction and viewpoint discrimination turns on the breadth of the category excluded. For example, an exclusion of a political convention from a state-owned sports arena would be permissible subject matter distinction; the exclusion of Republicans, but not Democrats, would be viewpoint discrimination. On this analysis, even if the District had excluded religious speech as such (something it did not in fact do), it would appear to have drawn only a permissible subject matter distinction. [16]

To be sure, *Lamb's Chapel* can be read as rejecting this analysis as applied to religious speech. But if it is so read, *Lamb's Chapel* conflicts with *Perry's* and *Cornelius'*

15.(...continued)
exclusion of all religious speech as subject matter and viewpoint based discrimination).

16. Ironically, the Eighth Circuit concluded that the proviso limiting the scouts to non-religious speech was evidence of viewpoint discrimination. A proviso whose evident purpose was to forestall a claim that the scout's religion was favored over the Club's thus is turned on its head to become evidence of bias against the Club.

approval of subject matter exclusions. Perhaps Petitioners misapprehend the line between subject matter and viewpoint discrimination. As *Grossbaum* demonstrates, however, they are not alone in having difficulty in marking that line.

Forum analysis has been criticized. *ISKCON v. Lee*, 112 S.Ct. 2711, 2715-16 (1992) (Kennedy, J., concurring and dissenting). But so long as it is the law, it should be neither self-contradictory nor so confusing as to provide no predictable guidance. A decision here would clarify the so-far elusive line separating viewpoint discrimination and subject matter distinctions.

III. *LAMB'S CHAPEL* AND *MERGENS* LEFT OPEN THE ESTABLISHMENT CLAUSE ISSUE PRESENTED HERE

Rejecting the District's Establishment Clause defense to the charge of viewpoint discrimination, the court below equated this case with this Court's rejection of Establishment Clause defenses in *Lamb's Chapel* and *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990), cases which

also involved access to public property for religious speech. The analogy, though beguiling, is not dispositive.[17] The facts here present an Establishment Clause question set aside in *Lamb's Chapel* and beyond the scope of *Mergens*.

Lamb's Chapel rejected a school district's Establishment Clause defense to a charge of viewpoint discrimination. This Court carefully limited its holding:

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations.

113 S.Ct. at 2178.

By contrast, the Club's target population were students of the very school in which the Club sought to meet, immediately after instructional time when the school itself was sponsoring other activities for these same students and

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17. The Eighth Circuit relied as well on *Widmar v. Vincent*, 454 U.S. 263 (1981), but that case involved a designated public forum, and is thus readily distinguishable from this case, and from *Lamb's Chapel* and *Mergens*.

when (other than the scouts) all other groups were denied access.[18]

Mergens likewise does not sustain the judgment below. As the Eighth Circuit itself recognized, *Mergens* upheld a federal statute compelling secondary schools to grant access to student-initiated religious clubs before and after school. The Act in question, the Equal Access Act, 20 U.S.C. § 4071, *et. seq.*, prohibited outsiders, such as the parents who led the Club (including, at one time, a member of the School Board), from controlling or participating in club meetings. And it pointedly does not apply to 6th, 7th and 8th grade which in Missouri are classified as part of elementary schooling.

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18. Other courts have determined (albeit before the decision in *Lamb's Chapel*) that permitting adult-sponsored religious groups targeting students to meet in school buildings immediately after instructional time would violate the Establishment Clause. *Quappe v. Endry*, 772 F.Supp. 1004 (S.D. Ohio 1991), aff'd 979 F.2d 851 (6th Cir. 1992) (table); *Ford v. Manuel*, 629 F.Supp. 771 (N.D. Ohio 1985).

This Court in *Mergens* accepted as reasonable the Congressional judgment that secondary school students were capable of making a distinction between school-sponsored[19] and non-school sponsored religious speech under the narrowly circumscribed conditions described in the Equal Access Act. 20 U.S.C. § 4071(c). See 496 U.S. at 250-51.

The negative implication -- that younger students cannot make that distinction -- is not just an inference from silence. The Senate version of the Equal Access Act addressed both elementary and secondary schools. S.1059, 98th Cong. 1st Sess. See, S.Rep. 98-357 at 38. In the course of Congressional consideration, extension of the Act to elementary schools was eliminated.

The Eighth Circuit's extension of *Mergens* to the elementary school students of Ladue Junior High School ignores this possibly constitutionally based limitation -- as

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19. See also the separate concurring opinion of Justice Marshall, joined by Justice Brennan. *Id.* at 262, 265-70.

well as the statutory restriction on access by outsiders, 20 U.S.C. 4071(c)(5), such as is sought here. At a minimum, the decision below is thus a substantial extension of existing law. Whether that extension is reconcilable with this Court's recognition of the impressionability of young students with regard to official endorsements of religion, *Edwards v. Aguillard*, 482 U.S. 578 (1987), is too important a question to remain unanswered.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Eighth Circuit.[20]

Robert McClintock
Counsel of Record
705 Olive Street
St. Louis, MO 63101
(314) 241-5673

Marc D. Stern
15 East 84th Street
New York, NY 10028
(212) 360-1545

January 25, 1995

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20. The questions presented in the Petition overlap to some degree the issues being considered by this Court in *Rosenberger v. Rector*, 94-329 and *Capitol Square Review and Advisory Board v. Pinette*, 94-780. Petitioners believe that neither of these cases will fully address the questions presented here. However, this Court may wish to hold this Petition pending resolution of those cases.

APPENDIX A

The GOOD NEWS/GOOD SPORTS CLUB, an unincorporated association; Jordan Heimburger, a minor, by his next friend, L. Corbett Heimburger; Christopher Hirt, a minor, by his next friend, Peggy Hirt; David Hirt, a minor, by his next friend, Peggy Hirt; Comfort Ibe, a minor, by her next friend, Afocha Ngozi Ibe; Peggy Hirt; John Hirt; Susan Mallory; George Mallory; Larry Tychsen; Dawn Huffman; Gabor Csengody; Pat Csengody; Afocha Ngozi Ibe; Kathryn Heimburger; L. Corbett Heimburger,

Appellants,

v.

SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation; Barbara Sacks; Charles H. Cobaugh; Joyce Follman; Robert Minkler; Ann Boon; Charles McKenna,

Appellees.

Center for Law and Religious Freedom, Amicus Curiae,

American Jewish Congress; Americans United for Separation of Church and State, Amici Curiae.

No. 93-2148.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 13, 1993.

Decided July 12, 1994.

Carl H. Esbeck, Columbia, MO, argued (Timothy Belz, St. Louis, MO, on the brief), for appellants.

Robert G. McClintock, St. Louis, MO, argued (John Gianoulakis and Robert A. Useted, on the brief), for appellees.

Before MAGILL, Circuit Judge, BRIGHT, Senior Circuit Judge, and BEAM, Circuit Judge.

MAGILL, Circuit Judge.

The Good News/Good Sports Club (the Club) and individuals affiliated with the Club[1] appeal the district court's judgment denying their challenge to the use-of-premises policy (Amended Use Policy) of the School District of the City of Ladue, Missouri (School District) that closes the School District's facilities between 3 and 6 p.m. on school days to all community groups except for the Scouts[2] and athletic groups. The Amended Use Policy also contains a proviso that prohibits the Scouts from engaging in any religious speech from 3 to 6 p.m. Because the Amended Use Policy results in viewpoint discrimination that does not serve a compelling governmental interest, we reverse the judgment of the district court.

I. BACKGROUND

The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. Club advertisements state that the Club is not sponsored by the School District. Parent volunteers run the Club meetings. The Club is open to junior high school students regardless of their race, creed, denomination or sex. The Club does require, however, parental consent before a student may attend a meeting. Club activities include skits,

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1. For convenience, we will refer to the Club, its members, and the parents of its members as "the Club."

2. The Scouts include: Girl Scouts, Boy Scouts, Cub Scouts, Tiger Cub Scouts and Brownies. *Good News/Good Sports Club v. School Dist.*, No. 92-CV1813, slip op. at 6, 1993 WL 719555, _____ F.Supp. _____, _____ (E.D. Mo. Mar. 2, 1993) (hereinafter, "Dist.Ct.Op.").

singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models. The Club is religious, but non-denominational.

The Club first met at the Ladue Junior High School in late 1988 and continued to meet through Spring 1992. During the 1991-92 school year, the Club's meetings took place on the first Monday of each month from 3 to 3:55 p.m. The timing of the meetings was convenient to Club members and their parents because the students could take the late bus home. In total, the Club met eight times during the 1991-92 school year.

In February 1992, several residents of the School District attended a school board meeting and complained about the religious content of the Club's meetings. The school board asked its attorney to evaluate the present use policy (1986 Use Policy) in response to the complaints against the Club. In late March, the school board passed a resolution allowing the Club to continue meeting for the remainder of the year. In July, the school board adopted the Amended Use Policy that closed the School District to all community groups, except the Scouts and athletic groups, between 3 and 6 p.m. on school days. The policy stated that:

> Permission for use of school facilities after instructional time ends on school days will be granted to Community Groups: (1) for use of District's athletic facilities, provided that the use is limited exclusively to athletic activities; and (2) for meetings of Scouts (Girl, Boy, Cub, Tiger Cub, and Brownies), provided that such meetings shall be limited exclusively to the scout program and shall

> not include any speech or activity involving religion or religious beliefs.

Dist.Ct.Op., at 6, _____ F.Supp. at _____. The exemption for the Scouts was based on the School District's "long-standing tradition of cooperation with scout programs." *Id.* at 10-11, _____ F.Supp. _____ at _____-_____. The Amended Use Policy excluded the Club from meeting at its regularly scheduled time, but allowed the Club access to school facilities after 6 p.m. on school days, and after 8 a.m. on weekends. The Club filed suit in district court, seeking injunctive and declaratory relief based on its First Amendment Rights.

After a bench trial, the district court returned a judgment in favor of the School District. The district court found that the School District's facilities constituted a non-public forum between 3 and 6 p.m. on school days. The district court also concluded that the long-standing relationship between the Scouts and the School District was a reasonable basis upon which to allow the Scouts to meet between 3 and 6 p.m. on school days and that the school board's concern over the possibility of an Establishment Clause violation was a reasonable consideration for excluding the Club under the Amended Use Policy. Finally, the district court determined that the Amended Use Policy did not discriminate on the basis of viewpoint.[3]

II. DISCUSSION

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3. Because we need not analyze the Club's religion clause claims, we express no opinion as to the district court's resolution of those claims.

The Club raises numerous grounds for reversal; we need consider only one: whether the Amended Use Policy results in impermissible viewpoint discrimination as described in *Lamb's Chapel v. Center Moriches Union Free School District*, _____ U.S. _____, 113 S.Ct. 2141 (1993). We hold that the Amended Use Policy results in viewpoint discrimination against the Club that does not serve a compelling governmental interest, and therefore, we reverse.

The School District's argument in opposition to the Club's viewpoint discrimination claim is three-fold. First, the School District argues that the Club waived the issue of viewpoint discrimination on appeal because it did not raise it at trial. Second, the School District argues that the district court properly held that its reason for adoption of the Amended Use Policy was reasonable and did not constitute viewpoint discrimination. Finally, the School District argues that if the Amended Use Policy results in viewpoint discrimination, that discrimination serves the compelling governmental interest of not violating the Establishment Clause.

A. Waiver of Viewpoint Discrimination

[1] The School District first argues that the Club never raised the viewpoint discrimination argument; rather, the School District characterizes the Club's argument as limited to a "limited public forum" argument in which the Club and the Scouts were similarly situated. The School District argues that the Club cannot raise this new argument on appeal. We disagree.

First, the Club did present the viewpoint discrimination argument to the district court. After the bench trial, in its post-trial brief, the Club *reiterated* its four theories of

recovery. The Club's third theory, based solely on the Free Speech Clause, claimed that the School District

> acted with unconstitutional motive so as to frustrate or make more difficult the meetings or religious organizations (in particular, the Club). The law does not require that the Defendants' motives have been malicious or hateful to be unconstitutional, only that they intended to cause the meetings of religious groups to be excluded between 3 and 6 p.m.

Club's Post-Trial Br., Doc 60, at 2-3. Amicus for the Club added further specificity to the Club's free speech claim by arguing the issue of viewpoint discrimination to the district court. Amicus Br., Doc. 46, at 13 & n. 11 (*Amicus* believes that the school district has created a designated forum . . .. However, we will focus on the protections that the First Amendment affords speech, even in a nonpublic forum."). To be sure, the Club's principal argument stressed that the School District had created a limited public forum, and that the Club and the Scouts were similarly situated. The Club's arguments, however, were not limited to that sole basis. *See* Club's Post-Trial Br., Doc. 60, at 10 n. 16 (stating that the Club has standing to raise its own rights with respect to viewpoint discrimination); Club's Br. in Support of Preliminary Injunctive Relief, Doc. 12, at 7 ("View-point [sic] discrimination has never been permitted in any of the three fora."). The Club raised the issue that adoption of the Amended Use Policy was based on an unconstitutional motive that violated the Free Speech Clause, *i.e.*, viewpoint discrimination.

Second, the School District's defense to the Club's free speech claim was that the Amended Use Policy created a

non-public forum, not a limited public forum. Any analysis of a governmental policy that limits speech in a non-public forum requires an inquiry into whether the policy is reasonable and viewpoint neutral. *See Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2147; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (remanding to district court for a determination of whether non-public forum policy was viewpoint neutral); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S.Ct. 948, 957 (1983). The School District was aware that the Constitution places restrictions on government exclusion of speech even in a non-public forum. In particular, the School District alerted the district court to the then-current standard in its post-trial brief by stating: "'Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*.'" School Dist.'s Post-Trial Br., Doc. 58, at 17 (quoting *Cornelius*, 473 U.S. at 807, 105 S.Ct. at 3451-52) (emphasis added). Thus, the School District's defense also put viewpoint discrimination into issue.[4]

Finally, the district court recognized that viewpoint discrimination was an issue in this case. Dist.Ct.Op. at 11, _____ F.Supp. at _____ (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 386 (2d Cir.

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4. The School District proffered evidence to establish that it had satisfied the reasonableness prong of the non-public forum analysis. School Dist.'s Br. at 41-42 n. 30 ("[The School District], nevertheless, briefed [the Establishment Clause issue] *below* to show their concerns were reasonable and the Court so found." (emphasis added)).

1992), *rev'd*, _____ U.S. _____, 113 S.Ct. 2141 (1993)).[5] In its memorandum opinion, the district court spent substantial effort determining whether the Amended Use Policy was reasonable and whether it constituted viewpoint discrimination. *Id.* at 17-18, _____ F.Supp. at _____ - _____. Thus, the district court recognized that viewpoint discrimination was an issue before it, and the district court decided that issue. *Id.*; *cf. Struempler v. Bowen*, 822 F.2d 40, 42 (8th Cir. 1987) ("When an issue was actually decided in the trial court, even though not expressly raised by the parties, the rule against consideration of the question on appeal loses a good deal of its force."); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (construing factual allegations in complaint to hold that claim of hostile work environment was before district court).

We conclude that (1) the Club raised the issue of viewpoint discrimination, (2) the School District's defense required a determination regarding viewpoint discrimination, and (3) the district court both recognized that viewpoint discrimination was an issue and made determinations on that issue. Therefore, we conclude that the Club has not waived the viewpoint discrimination claim.

B. Viewpoint Discrimination

"Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose

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5. The district court relied, and the dissent now relies, in part, on the Second Circuit's legal analysis in *Lamb's Chapel*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, _____ U.S. _____, 113 S.Ct. 2141 (1993). The district court, however, did not have the benefit of the Supreme Court's decision that reversed the Second Circuit and rejected its legal analysis.

served by the forum *and* are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry*, 460 U.S. at 49) (emphasis added); *see also Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2147.[6] We turn to whether the Amended Use Policy results in viewpoint discrimination.

The School District argues that the district court properly concluded that adoption of the Amended Use Policy did not constitute viewpoint discrimination. The School District argues the Club failed to demonstrate that "(1) the forum . . . include[s] the subject matter of the [Club's] viewpoint; (2) the [Club] . . . ha[s] a particular viewpoint regarding the subject matter; and (3) the [School District] oppose[d] that viewpoint." School Dist.'s Br. at 32-33 (footnotes omitted; citing *Cornelius*, 473 U.S. at 806, and *Perry*, 460 U.S. at 49). To the extent that these factors reflect current viewpoint discrimination law, we examine them in turn.

First, the subject matter for which the Club sought access to the School District facilities already was included in the forum as evidenced by the Scouts' speech. *See Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an *otherwise includible subject*." (emphasis added)). When the district

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6. We assume, without deciding, that the district court properly found that (1) the Amended Use Policy did not create a limited public forum from 3 to 6 p.m. on school days, and (2) the Amended Use Policy's favoritism to the Scouts based on the Scouts' long-standing relationship with the School District is reasonable. *But see R.A.V. v. City of St. Paul*, _____ U.S. _____, _____, 112 S.Ct. 2538, 2545 (1992) ("[G]overnment may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed.").

court analyzed whether the Scouts and Club were similarly situated, it determined that

> [a]lthough *both the Club and the Scouting program are concerned with the moral development of youth*, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith.

Dist.Ct.Op. at 21, _____ F.Supp. _____ (emphasis added). The district court also found that "[t]he purpose of Scout meetings is for the young persons involved to have fun, *to support the ideals of Scouting*, education, and *reinforcement of moral values*." *Id.* at 20, _____ F.Supp. at _____ (emphases added). The ideals of Scouting are set out in the Scouting handbooks, which the School District provided to the district court, under the heading "Scout Law": **"A Scout is TRUSTWORTHY . . . A Scout is LOYAL . . . A Scout is HELPFUL . . . A Scout is FRIENDLY . . . A Scout is COURTEOUS . . . A Scout is KIND . . . A Scout is OBEDIENT . . . A Scout is CHEERFUL . . . A Scout is THRIFTY . . . A Scout is BRAVE . . . A Scout is CLEAN . . . A Scout is REVERENT."** School Dist.'s Ex. PP, at 7-8 (emphasis in original); *see also id.* at 9 ("The Scout slogan is DO A GOOD TURN DAILY. Good Turns are helpful acts of kindness done quietly, without boasting, and without expecting reward or pay. Doing at least one Good Turn every day is a normal part of a Scout's life."). *See generally* School Dist.'s Exs. QQ, RR, SS, TT, UU, VV

(Scout manuals describing ideals of Scouting).[7] Thus, the "ideals of Scouting," which Scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development.

Further, the Amended Use Policy defines the scope of permissible speech from 3 to 6 p.m. by reference to the speech which may occur during the Scout meetings. The Scouts may engage, with the School District's blessing, in any speech relating to moral character and youth development. *Id.* at 6; *cf. Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2147. Because both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy.[8]

Second, the Club has demonstrated that it has a viewpoint, *i.e.*, a religious viewpoint, regarding moral character and youth development. *See id.* In *Lamb's*

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7. Thus, the dissent's contention that "Scout meetings [did not] include[ ] 'speech' on the subject of moral development as an integral part of their programs," *post*, at 1518, fails because of the same factual findings that the dissent characterizes as "unquestionably correct," *id.* at 1518. Like the Club, the Scouts use their meetings as a forum for the purpose of developing moral and character development through skits, songs, and activities. The only difference is that the Club employs a religious perspective.

8. To the extent that the School District argues that the subject matter of the Club's speech is not already included in the forum because religious speech is a separate speech category, the Supreme Court already has rejected that argument. *Cf. Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2147 (stating that lecture or film about childrearing and family values from religious perspective was not "subject matter . . . the District has placed off limits to any and all speakers," when other speakers could discuss same topics from non-religious perspective).

Chapel, the Supreme Court held that denial of access to a religious group to show films regarding childrearing and family values from a religious perspective constituted impermissible viewpoint discrimination. *Id.* The *Lamb's Chapel* Court held that the religious group had demonstrated its particular viewpoint because its proposed First Amendment expression, on otherwise includible subject matter, had a religious perspective. *Id.* _____ U.S. at _____ - _____, 113 S.Ct. at 2147-48. "Viewpoint" is not limited to whether a speaker supports or opposes a particular resolution of an issue; rather, viewpoint is synonymous with perspective. *Id.* _____ U.S. at _____, 113 S.Ct. at 2147 (stating that religious film was excluded because "presentation would have been from a religious perspective"). The *Lamb's Chapel* Court stated:

> That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

Id.[9] Further, the *Lamb's Chapel* Court refused to cabin

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9. The dissent seeks to create an additional requirement for establishing that a policy is viewpoint discriminatory; namely, the group challenging the policy must be similar to groups already allowed into the forum. *Post*, at 1517-18. This inquiry is both misleading and irrelevant. The *Lamb's Chapel* Court conducted no inquiry into whether the Lamb's Chapel group was similar to groups already within the forum when it determined that the Center Moriches school district had discriminated against the Lamb's Chapel group based on religious viewpoint. _____ U.S. at _____ - _____, 113 S.Ct. at 2146-47. The relevant inquiry on

(continued...)

religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of *seemingly* secular subject matter. *Id.* The Club has demonstrated, and the district court found, that the Club has a religious viewpoint on moral issues and youth development. *See* Dist.Ct.Op. at 20-21, _____ F.Supp. at _____-_____ (holding that Scouts and the Club are not similarly situated because the Scouts are secular and the Club is religious). The district court's determination is unquestionably correct.

Finally, the School District claims that before this court can hold that the Amended Use Policy resulted in viewpoint discrimination, this court must determine that the School District was hostile or opposed to the Club's viewpoint.[10] The School District cites to statements in *Perry* and *Cornelius* to support this argument; *Lamb's Chapel* requires us to reject it.

The Club need not establish that the School District opposed the Club's viewpoint; rather, the Club need only demonstrate that the Amended Use Policy allowed the Scouts to express their viewpoint on moral and character

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9.(...continued)
this point is whether the Club seeks access to the forum to express a point of view on subject matter already includible in the forum. *See id.* ("That subject matter is not one that the School District has placed off limits to any and all speakers."). The Club seeks to express ideals on moral and character development already included in the forum by the Scouts.

10. The dissent argues that there is no evidence that the School District sought to "destroy" the Club. The Club never argued that the School District acted to destroy the Club, Club's Br. at 15 n. 15; thus, far from abandoning this claim on appeal, the Club never raised it.

development but prohibited the Club's religious viewpoint. In *Lamb's Chapel*, the Supreme Court determined that the school access policy constituted impermissible viewpoint discrimination without any determination that the school officials opposed or disagreed with the religious perspective proposed. *See* _____ U.S. at _____-_____, 113 S.Ct. at 2147-48. The relevant inquiry was whether the Lamb's Chapel group was excluded because of its religious viewpoint, irrespective of whether the school district opposed that viewpoint. *Id.*

In this case, the district court found that "the citizen comments and complaints about the Club were the primary factor leading to the School Board's *examination* of the 1986 Use Policy *and eventual adoption* of the Amended Use Policy." Dist.Ct.Op. at 17-18, _____ F.Supp. at _____-_____ (emphases added). The only complaints registered against the Club were in reference to the religious content of the Club's meetings. *Id.* at 17, _____ F.Supp. at _____ ("[The Club] presented evidence, *as did [the School District]*, that criticism from some members of the community about the religious nature of the Club was the catalyst for amending the Policy." (emphasis added)).[11] We cannot say that the district court's finding that the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from its premises from 3 to 6 p.m. on school days was clearly erroneous.

Even if we were to reject this finding as clearly erroneous, which we do not, the School District's viewpoint

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11. The School District's defense in this case was that allowing the Club to continue to meet between 3 and 6 p.m. on school days would result in an Establishment Clause violation. Dist.Ct.Op. at 12, _____ F.Supp. at _____.

discrimination appears on the face of the Amended Use Policy. Specifically, the Amended Use Policy allows the Scouts access to the facilities so long as "such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs." *Id.* at 6. Thus, like the utilization policy in *Lamb's Chapel*, the Amended Use Policy restricts access to the facilities based on religious viewpoint. *See* _____ U.S. at _____, 113 S.Ct. at 2144.[12]

Thus, we conclude that the Amended Use Policy results in viewpoint discrimination because it denies the Club access based on the Club's religious perspective on otherwise includible subject matter.

C. Compelling Governmental Interest

The School District argues, in the alternative, that viewpoint discrimination is justified because it serves the compelling governmental interest of avoiding an Establishment Clause violation. School Dist.'s Br. at 41.[13]

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12. Amici for the School District argue that the breadth of excluded speech belies the Club's viewpoint discrimination claim. The Amended Use Policy excludes only one viewpoint expressly: the religious viewpoint. Thus, the Scouts can approach moral character and youth development from any perspective they wish except one: a religious perspective. Like *Lamb's Chapel*, the only perspective expressly excluded is the religious perspective.

13. The dissent erroneously argues that this section of the majority opinion involves resolution of a "non-issue." *Post*, at 1514 n. 4. Because we have determined that the Amended Use Policy is viewpoint discriminatory, the School District only can justify that discrimination if it serves a compelling government interest. This section analyzes whether

(continued...)

An abridgement of free speech otherwise protected by the First Amendment must be justified by a compelling governmental interest. *Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2148. Further, "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment." *Id.* (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (alteration by *Lamb's Chapel*).

The School District frames the issue as follows: "[T]he Court must determine whether an adult initiated and led community group holding religious meetings in an elementary school from 3:00 to 4:00 p.m. on school days, while elementary students remain at school engaged in school sponsored activities, would be a violation of the Establishment Clause." School Dist.'s Br. at 41. The School District's argument is, in a nutshell, that adoption of the Amended Use Policy was necessary to prevent an establishment of religion resulting form the 1986 Use Policy. Thus, we must determine whether the 1986 Use Policy created an impermissible establishment of religion.

Although much maligned, the *Lemon* test controls this court's analysis of whether governmental activity results in an impermissible establishment of religion.[14] *See Lemon v.*

13.(...continued)
adoption of the Amended Use Policy by the School District served the compelling governmental interest of avoiding an Establishment Clause violation.

14. Our task is made more difficult because neither the School District nor any of its amici has cited *Lemon* or applied the *Lemon* test to the establishment of religion issue.

Kurtzman, 403 U.S. 602 (1971); *see also Mergens v. Board of Educ.*, 867 F.2d 1076, 1079 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990); *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981). In order to satisfy the *Lemon* test, a challenged governmental action must (1) have a secular purpose, (2) not have the primary or principal effect of advancing religion,[15] and (3) not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. We examine whether the 1986 Use Policy violates *Lemon*.

1. Secular Purpose

We first examine whether the 1986 Use Policy had a secular purpose. "The 1986 Use Policy allowed access to any community or student organization upon application for a permit and depending on availability of space." Dist.Ct.Op. at 5, _____ F.Supp. at _____. We have little trouble concluding that opening the schools for expressive conduct to community and student groups serves the secular purpose of providing a forum for an exchange of ideas and social intercourse. Thus, the 1986 Use Policy satisfies the secular-purpose prong of *Lemon*.

2. Primary or Principal Effect

The primary effect of the 1986 Use Policy is not the advancement of religion. *See Chess*, 635 F.2d at 1317

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15. Justice O'Connor has adopted an approach that refines the effect prong of *Lemon* to determine whether the governmental action has endorsed religion. *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J., concurring) ("The effect prongs asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). A majority of the Supreme Court has not yet adopted Justice O'Connor's endorsement test.

(holding that open access policy at University would serve secular purpose of developing students' "'social and cultural awareness'"). Rather, any incidental benefits to religion are secondary to the primary secular effect of providing a neutral forum for the exchange of ideas. The 1986 Use Policy does not "confer any imprimatur of state approval on religious sects or practices," *Widmar*, 454 U.S. at 274, because that policy opens the school district facilities to any and all community and student groups. The empirical evidence demonstrates that the Club's uses under the 1986 Use Policy were dwarfed by the non-religious uses of the Scouts and other groups. During the 1991-92 school year the Club met 8 times, the Scouts met 193 times, and athletic activities met 778 times. The Club's meetings comprised 8 of 993 total uses. We cannot say that the School District facilities were so overrun by the Club that the primary effect of the 1986 Use Policy was the advancement of religion.[16]

Some of the cases cited by the School District emphasize factors that may inform the primary-purpose prong analysis of the *Lemon* test. Those factors include (1) the age of the students -- from eleven to fifteen years old; (2) the timing of the meetings -- immediately after instructional time; and (3) the involvement in the Club by Jane Cunningham, a former school board member.

We conclude that the age of the junior high school students does not create an Establishment Clause violation. In *Mergens*, Justice O'Connor, speaking for a four-Justice

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16. To the extent that the Club receives a benefit because its members can utilize the school late bus, this benefit does not violate the Establishment Clause. *See Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (upholding a state statute that reimbursed parents of parochial school students for bus transportation expenses).

plurality, stated that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 259-60 (plurality opinion); *see also id.* 496 U.S. 250 (Kennedy, J., concurring) (abandoning *Lemon* analysis for coercion analysis). Justice O'Connor further explained that secondary school students -- in that case, high school students -- were mature enough to make this distinction between private speech and public speech because "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Id.* (plurality opinion) (adopting congressional fact-finding in the Equal Access Act that rejected likelihood of confusion by "secondary school" students with respect to difference between public and private speech).

The Seventh Circuit in *Hedges v. Wauconda*, 9 F.3d 1295, 1298-1300 (7th Cir. 1993), recently extended this analysis to junior high school students. In *Wauconda*, the school district sought to prohibit junior high school students from passing out religious literature immediately before and after classes. *Id.* at 1298. The Seventh Circuit rejected the school's argument that the suppression of speech was justified to avoid the appearance of religious sponsorship. *Id.* at 1298-99. In doing so, the *Wauconda* court held that students could appreciate the difference between public and private speech because it was not a difficult concept. *Id.* at 1300 ("If pupils do not comprehend so simple a lesson, then one wonders whether the Wauconda schools can teach anything at all.").[17] We agree with the Seventh Circuit that

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17. Students are not permitted to attend Club meetings until their parents complete a parental consent form. Club's Br. at Add. E-1 (continued...)

junior high school students can appreciate the difference between public and private speech, and therefore the 1986 Use Policy did not result in an Establishment Clause violation.[18]

Second, the timing of the meetings, immediately after school, does not result in an establishment of religion. The basis behind the timing argument is that state law compels student attendance at school. This argument loses much of its force because the Club meetings are held after instructional hours when student attendance is no longer compelled. *See Mergens*, 496 U.S. at 250; *see also Hedges*, 9 F.3d at 1298 ("[N]othing in the first amendment postpones the right of religious speech until high school, or draws a line between daylight and evening hours."). Thus, we conclude that the timing of the meetings did not render the 1986 Use Policy unconstitutional.

Finally, the School District relies on the fact that a former school board member, Jane Cunningham, was involved with the Club. The School District attempts to

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17.(...continued)
("Parental Notice and Consent Form"). In addition, announcements for the Club stated that the Club stated that the Club was not sponsored by the School District. *Id.* at Add. C-1 ("The Club is not a Ladue School sponsored activity.").

18. *Quappe v. Endry*, 772 F.Supp. 1004, 1011-12 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992), does not compel a different result. In *Quappe*, the district court determined that grade school children from 5 to 10 years old would not be able to distinguish between government and private speech. *Id.* The students at issue here are 11 to 15 years old. We disagree, however, with the *Quappe* court that one needs "Solomonic wisdom" to distinguish between private and public speech.

analogize Cunningham's involvement with the Club to the involvement of the classroom teacher in *Quappe* whose actions created a state endorsement of religion. 772 F.Supp. at 1014-15. In *Quappe*, the teacher "used her classroom as a forum for dissemination of her religious view"; "[s]he used her classroom to recruit members for the Club"; and "[h]er participation in the Club, therefore, created a substantial danger that Club members would view the Club as an officially endorsed extension of the regular school day." *Id.* at 1014.

The circumstances here are distinguishable. Cunningham's position as a former school board member does not create the same problems of "'the students' emulation of teachers as role models'" perceived in *Quappe*. Cunningham had no classroom from which to recruit; nor would her appearance after instructional hours create the same danger of an appearance of a continuation of the school day as if she were a teacher present throughout the day. More to the point, Cunningham was no longer involved with the Club when the School District adopted the Amended Use Policy. *Cf. Id.* at 1006 (stating that teacher "has continued to play a significant role in the Club's existence"). Thus, Cunningham's former involvement with the Club does not create the danger of a perception of an establishment of religion.

In summary, the primary or principal effect of the 1986 Use Policy was not the advancement of religion; rather, the primary effect was to establish a neutral forum for community and student groups to engage in the exchange of ideas.

3. Excessive Government Entanglement with Religion

Finally, we turn to whether the 1986 Use Policy resulted in excessive entanglement with religion. The 1986 Use Policy results in no entanglement with religion because the School District need not distinguish among groups or monitor the community groups that utilize its facilities. *Chess*, 635 F.2d at 1317 ("[S]ince [an open-access] policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided." (internal quotes omitted)). Further, the Club's requirement that students obtain written parental consent before they can attend would dispel any need for a school monitor to determine that attendance was voluntary. *Cf. Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).[19]

We conclude that the 1986 Use Policy had a secular purpose, did not have the primary effect of advancing religion, and did not result in impermissible entanglement with religion. Thus, the 1986 Use Policy did not result in an establishment of religion.

Adoption of the viewpoint discriminatory Amended Use Policy, therefore, did not serve a compelling governmental interest. Therefore, we hold that the Amended Use Policy

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19. Ironically, the Amended Use Policy adopted by the School District creates substantial entanglement problems. To enforce its no-religion proviso, the School District first must determine what speech constitutes religious speech, and then needs to monitor Scout meetings to ensure compliance with the religion proviso. *See Chess*, 635 F.2d at 1318. Thus, the Amended Use Policy adopted by the School District creates more pressing establishment problems than the 1986 Use Policy it replaced. *See Widmar*, 454 U.S. at 272 n. 11 (citing *Chess v. Widmar*, 635 F.2d at 1318; *see also Mergens*, 496 U.S. at 246-47 (plurality opinion) (stating that open use policy would "*avoid* entanglement with religion").

violates the free speech clause of the First Amendment because it results in impermissible viewpoint discrimination.

III. CONCLUSION

Accordingly, we reverse the judgment of the district court and remand to the district court for a determination of a remedy consistent with this opinion.

BRIGHT, Senior Circuit Judge, dissenting.

The constant vigilance of this nation's courts has preserved the religious liberty of all people in the United States by keeping churches and governments from meddling in each other's business and activities. The wall of separation between church and state is not inimical to religion, but has permitted diverse religious beliefs to flourish. The principles embodied in the Establishment Clause of the First Amendment[1] have spared the United States much of the religious strife that has plagued other countries. Although most Americans subscribe to the principle of separation between church and state, history indicates that the majority religion in many communities often seeks to have a public school carry out a religious mission or function compatible with the views of the majority.

In this case, the Ladue School Board has adopted a neutral policy toward community groups seeking to conduct their activities at the Junior High School during the school day. Although formal instruction ends at 3 p.m., the Board considers the school day as extending from the morning hours to 6 p.m., when school-sponsored activities end. All community groups, including religious and political groups, have access to school facilities after 6 p.m. on school days and after 8 a.m. on non-school days. The period from 3 to 6 p.m. remains reserved for school-sponsored activities, community athletic endeavors, and scouting activities, which by tradition and experience relate closely to the secular

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1. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion . . .." U.S. Const. amend. I.

education at the Ladue Junior High School. The School Board's policy is not an anti-religious one.

The plaintiffs in this case -- parents who wish to teach and instill Christian religion and values, and student Club members -- brought this action asserting the Club's right to meet at the school between 3 p.m. and 4 p.m. The plaintiffs contend that this time slot is more than a matter of convenience for participating students and parents; they urge that the Club will be destroyed if it cannot meet at this hour.[2]

In this case, the district court, the Honorable Edward Filippine, Chief Judge, granted the parties a full hearing, made extensive findings of fact, applied the applicable law to his findings and rejected the Club's claims asserting that the School Board unconstitutionally deprived Club members of their rights.[3]

The majority opinion in this case, without the full analysis of Judge Filippine's opinion, seizes on a single claim made by the plaintiffs that the school policy results in viewpoint discrimination against the Club. That conclusion

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2. Nothing in the record supports the Club's contention that it would be destroyed if denied its preferred meeting time. Club parents favor the 3-4 p.m. time period primarily because student members can go directly to Club meetings after classes end, and still catch the 3:55 p.m. late bus home. The Club's assertion that it would suffer significant harm under the 1992 Policy is undercut, however, by the undisputed fact that students can take the 3 p.m. school bus anywhere, including to a Club leader's residence for a meeting. The only inconvenience to parents would relate to transportation of children from meeting place to students' homes.

3. *Good News/Good Sports Club v. School Dist. of the City of Ladue*, _____ F.Supp. _____, _____-_____, No. 4:92CV1813, slip op. at 10-11 (E.D. Mo. Mar. 2, 1993).

is reached by ignoring Judge Filippine's careful and detailed findings of fact, misconstruing the factual record made in this case and thereafter attempting to apply the precedent of *Lamb's Chapel v. Center Moriches School District*, _____ U.S. _____, 113 S.Ct. 2141 (1993), to reach its conclusion. Because *Lamb's Chapel* does not control on the facts of this case, the majority reaches an erroneous result.

In my view, the majority's holding -- based on misinterpretation of the facts and misapplication of the law -- leads to improper judicial interference with the School Board's policies, and represents judicial activism which has no warrant under existing law. I therefore strongly dissent.

I. ANALYSIS

A. District Court's Findings of Fact and Application of Law

The majority opinion, I believe, has taken liberties with the district court's findings of fact in arriving at its result. Accordingly, I deem it appropriate and helpful to summarize the findings of the district court and the conclusions flowing therefrom.

Initially, the district court found that the Club began in the late 1970s when the children met once a month in the homes of interested adults. In December of 1988 Superintendent Charles McKenna, now a defendant, granted the Club permission to meet once a month at the Junior High School. Under the name "Good News Club," the group met monthly during the 1988-89, 1989-90 and 1990-91 school years.

The term "Bible" first appeared on the Club's permit application for the 1991-92 school year, thus clearly denoting the organization as a religious club. Soon after, a conflict arose among parents of school children. At the Board's February 1992 meeting, two parents complained of alleged recruitment of their children by the Club. These complaints prompted the Board to review its prior policy (hereinafter "1986 Policy") governing community group access to school facilities. As part of that review, the Board had its staff attorney research the Establishment Clause issue. The Board also held public hearings where parents aired their views and concerns.

Based on its review, the Board adopted its present policy in July, 1992 ("1992 Policy"). The 1992 Policy opened the schools to all community groups after 6 p.m. on school days and after 8 a.m. on other days. This policy closed the schools to all community groups between the hours of 3 p.m. and 6 p.m. on school days, with two exceptions: (1) community athletic groups and (2) Scout groups. The 1992 Policy also contained a proviso excluding all religious speech from the forum between 3 and 6 p.m. When the Board rejected the Club's subsequent application requesting permission to meet at 3 p.m., the Club filed this action seeking prospective injunctive relief.

B. Whether the Ladue School Board Created a Limited Public Forum Between 3 and 6 p.m. on School Days

The Club contended in the district court and on appeal that by permitting Scout activities after 3 p.m. on school days, the Board created a limited public forum open to the Club. Relying on *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the trial

court rejected plaintiffs' contention that Scouting use of school facilities between 3 and 6 p.m. justified the Club's application. The district court stated:

> The reason given by the School Board for allowing access to Scouts immediately after school hours is that the School District has a 'long-standing tradition of cooperation with scout programs . . ..' Defendant's Ex.L. The Court finds this explanation valid and reasonable. This type of selective access to a community group with a long-standing relationship with the School District does not convert the non-public forum of public school facilities into a limited public forum. Scouting activities are compatible with the purposes of public education and, especially in light of the School District's long term relationship with the Scouts, the Court finds that limiting access to Scouting groups is reasonable. During the period of 3:00 to 6:00 p.m., the School District facilities are not open 'for indiscriminate use by the general public . . ..' Perry Educ. Ass'n, 460 U.S. at 47. The facilities are available only for selective access by Scouts and by those wishing to use the athletic facilities. Under the facts of this case, the Court finds that the Ladue Public School facilities are a nonpublic forum from 3:00 to 6:00 p.m.

Good News/Good Sports Club v. School Dist. Of the City of Ladue, _____ F.Supp. _____, _____-_____, No. 4:92CV1813, slip op. at 10-11 (E.D.Mo. Mar. 2, 1993).

The trial court ruled correctly on this issue and the majority does not overrule that determination. Public schools have never been considered traditional public fora which

"time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Thus, Ladue Junior High School is not a traditional public forum.

Nor did the Board "designate" the School as an open forum for speech between 3 and 6 p.m. A school facility may be deemed a public forum only if school authorities by policy or practice open those facilities for general use by the public, or by some segment of the public, such as student organizations. *Id.* at 267. Here, the Board did not, by policy or practice, open its facilities in this manner. Indeed, the Board adopted its 1992 Policy with the specific intent of *closing* what may have been a limited public forum under its prior policy. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (court looks to government policy and practice to determine whether it intended to designate a place not traditionally open to free discourse as a public forum).

C. Whether the School District Acted to Destroy the Club

Plaintiffs asserted in the district court that the School Board acted with the intent to destroy the Club because of its religious activities. The trial court rejected that contention, stating:

> The Court further finds that no evidence supports plaintiffs' contention that the School Board acted with the intent to destroy the Club because of its religious activities. All of the evidence presented supports the conclusion that the Board heard evidence both pro and con regarding the Club; that

> all comments were seriously considered by the Board members; and that the Board members sought legal advice from their attorney as how best to meet the needs of the community without risking a constitutional violation. The Court finds no credible evidence to support a finding that the School Board acted with an unconstitutionally discriminatory motive in amending the Use Policy.

_____ F.Supp. at _____ (Dist.Ct.Op. at 19). This contention has been abandoned on this appeal.

D. Whether the Board's Policy Amounts to Viewpoint Discrimination

Upon determining that the 1992 Policy did not create a limited public forum, the district court analyzed the facts and law in determining that the Board did not violate the free speech rights of the students or adults in the Club. The court observed that the Board's reasons for adopting a new access policy need only meet a standard of reasonableness:

> Because the Court finds that the Amended Use Policy does not create a limited public forum, but that the School District facilities are a nonpublic forum from 3:00 to 6:00 p.m., the restriction on plaintiffs' access immediately after instructional time must only meet the standard of reasonableness. The reasonableness standard is met 'when the applicable restrictions "reflect a legitimate government concern and do not suppress expression merely because public officials oppose the speaker's view."' *Lamb's Chapel*, 959 F.2d at 386 (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)). Furthermore, 'the restriction "need only be

> *reasonable*; it need not be the most reasonable or the only reasonable limitation."'. *International Soc'y for Krishna Consciousness v. Lee*, _____ U.S. _____, _____, 112 S.Ct. 2701, 2708 (1992) (emphasis in original) (quoting *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion)).
>
> If the justifications given are facially reasonable, the Court must then determine whether the proffered reasons are mere pretext for viewpoint discrimination. *Cornelius*, 473 U.S. at 797. Although the government may restrict access to a non-public forum based on the subject matter of the speech, the Court must determine whether the restriction 'conceal[s] a bias against the viewpoint advanced by the excluded speakers.' *Id.*, 473 U.S. at 812.

_____ F.Supp. at _____ (Dist.Ct.Op. at 11-12).

1. Fear of an establishment clause violation

The trial court then examined and made findings relating to the Board's policy as follows:

> One reason provided by the School District for amending the 1986 Use Policy is that the type of access allowed under the 1986 policy *might*[4] violate

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4. The majority spends seven pages, *see ante*, at 1507-11, attempting to resolve the non-issue of whether the 1986 Use Policy violated the Establishment Clause. The 1986 Policy has been abandoned. Whether that policy actually violated the Establishment Clause has not been ruled

(continued...)

> the Establishment Clause of the First Amendment. Plaintiffs contend that the 1986 Policy did not violate the Establishment Clause. The question whether or not the 1986 Policy violated the Establishment Clause, however, is not before this Court; this Court must determine only whether defendants' concern over a possible constitutional violation, resulting in closing the limited public forum from 3:00 to 6:00 p.m., was a true reason and a reasonable justification for amending the 1986 Use Policy.

In a recent case involving a claim of violation of the Establishment Clause, the Supreme Court held:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

Lee v. Weisman, _____ U.S. _____, _____, 112 S.Ct. 2649, 2655 (1992).

> In a number of cases, United States Courts have found Establishment Clause violations where access

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4.(...continued)
upon by the district court. The district court examined only the reasonableness of the concern that the policy *might* violate that clause.

to school district facilities by religious groups was allowed. In *Bell v. Little Axe Indep. School Dist. No. 76*, 766 F.2d 1391 (10th Cir. 1985), the court recognized 'the special concern for religious neutrality in the public school setting[.]' *Id.* at 1402. The court held that the school violated the Establishment Clause when it allowed religiously-oriented student meetings in the school before classes began. *Id.* at 1407. In *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir.), *reh'g denied*, 680 F.2d 424 (1982), *cert. denied*, 459 U.S. 1155 (1983), the court found an Establishment Clause violation where a school district policy permitted students to gather either before or after school hours for Bible readings and other religious activity.

In a case with facts similar to the instant case, a district court found that permitting a Bible study club to meet immediately after classes would have violated the Establishment Clause. *Quappe v. Endry*, 772 F.Supp. 1004 (S.D. OH 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992). Although the facts of these and other cases may be distinguishable from the facts in the instant case, this does not diminish the reasonableness of defendants' concern regarding a possible Establishment Clause violation under the 1986 Use Policy. The credible evidence at trial was that the School Board had received complaints from some parents and citizens within the School District regarding meetings of the Club directly after school. At least one parent complained that her child had been approached and solicited by another student to attend meetings of the Club.

> Plaintiffs contend that the fear of an Establishment Clause violation was not reasonable and was not a valid consideration when the School Board amended the Use Policy to restrict plaintiffs' after school access. The United States Court of Appeals for the Eighth Circuit, however, has found that concern regarding an Establishment Clause violation is a 'reasonable justification' for placing restrictions on access to school facilities for religious groups. *Salinas v. School Dist. of Kansas City*, 751 F.2d 288, 290 (8th Cir. 1984). Under the circumstances of this case, and in light of relevant Establishment Clause case law, the Court finds that defendants' concern was reasonable.

_____ F.Supp. at _____ -_____ (Dist.Ct.Op. at 12-14). The cases cited by the district court support adequately its conclusion of reasonableness, particularly since no caselaw clearly supports a conclusion contrary to that reached by the Board.

Further proof of the reasonableness of the Ladue School District's Establishment Clause fears is demonstrated by a review of federal court cases. Our research discloses that no federal court has held that a parent-led religious youth group possesses the constitutional right discovered by the majority today. That is, no court to date has determined that a parent-sponsored religious club has a constitutional right to meet on school property before school children have had the opportunity to depart school premises following mandatory instruction, merely because Scout and community athletic groups are permitted to do so. The Supreme Court's school prayer cases, *see, e.g., School District of Abington Tp., PA. v. Schempp*, 374 U.S. 203 (1963) (requiring students to recite Bible verses and the Lord's prayer at opening of

school day violated Establishment Clause), along with *Perry* and *Cornelius*, all suggest that the Board's concerns were reasonable, and their actions rational. *See also Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1167 (7th Cir. 1993) (Establishment Clause violated by permitting Gideons to distribute Bibles to public school students during the school day).

We have examined cases upholding the equal access rights of student-initiated religious groups on college and high school campuses. *See, e.g., Board of Educ., Westside Community Sch.* v. *Mergens*, 496 U.S. 226 (1990) (student-sponsored high school religious group entitled under Equal Access Act to use school facilities immediately after classes end); *Widmar v. Vincent*, 454 U.S. 263 (1981) (student religious group entitled to equal access to facilities of state university). These cases do not apply to adult-initiated groups seeking access to an elementary school forum, here consisting of the sixth, seventh and eighth grades.

Importantly, with respect to a nonpublic forum, the government does not have to select the best or only method of accomplishing its mission of avoiding the appearance of improper endorsement. *International Society for Krishna Consciousness v. Lee*, _____ U.S. _____, _____, 112 S.Ct. 2701, 2708 (1992) ("the restriction 'needed only be reasonable; it need not be the most reasonable or the only reasonable limitation.'") (quoting *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion)).

I also comment briefly on the concern of parents who do not want their children to participate in the Club or to be recruited for Club activities. The parental notice, Exhibit 4, would indicate children of other creeds, denominations or religions could be subject to peer pressure to join this

religious club, all to the discomfort of parents who might profess other beliefs. The parental notice states, in part:

> Our **purpose** is to provide any willing and informed student ages 11 to 15 an opportunity to experience Christian fellowship with other students and to allow any student who desires, and has parental consent, no matter what race, creed, denomination, or sex to examine the values taught by Christianity.

Parental Notice and Consent Form, Appellant's Add. at E-1.

A handout given to all students provides a further example of the Club's peer pressure approach to children of non-Christians or to children of denominations whose parents strictly observe only their own religious practices. The pamphlet in part reads:

> We're excited to welcome you back to another year of fun at the GOOD NEWS CLUB, a once-a-month gathering of 6th, 7th and 8th graders from Ladue Junior High.
>
> . . ..
>
> The theme for this year is FRIENDSHIP and will include the topics of becoming friends with God, choosing friends, being friends, when opposites attract, being friends with our parents, and friends forever.
>
> The goal of the Good News Club is to develop a positive peer group among students so that if/when the drug and other tough dilemmas come just around the corner, it will be easier for kids to stand

> together for what is right with a common foundation of Biblical principles and a personal relationship with God, rather than trying to stand alone. Our approach is nondenominational.

Appellant's Add. at C-1.

This sort of pressure or inducement, perhaps subtle proselytizing, directed to sixth, seventh or eighth graders should be a matter of concern to and enter into a policy decision by the School Board. *See Lee v. Weisman*, _____ U.S. _____, _____, 112 S.Ct. 2649, 2658 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

2. Avoiding Controversy and Strife in the Junior High School

The School Board offered a second reason for the adoption of the 1992 Policy. The district court stated:

> Defendants also assert they were concerned that a number of religious groups, hate groups, and/or other controversial groups might seek access immediately after school hours under the 1986 Use Policy. The record does not reflect that any such group had sought access under the 1986 Policy. It is proper, however, for a state to consider the possible large number of groups which might seek access to state facilities. *Heffron [v. International Society for Krishna Consciousness, Inc.]*, 452 U.S. [640] at 653 (1981)]. In *Heffron*, the International Society for Krishna Consciousness ("ISKCON") challenged a Minnesota state regulation restricting solicitation at the state fair to designated booths.

> ISKCON contended that this restriction infringed its First Amendment right to proselytize and raise funds for its religious organization. In upholding the state regulation, the Supreme Court recognized that it was proper for the state to consider the possibility that all other groups at the state fair might also seek to solicit from the general public by walking through the fairgrounds although no evidence was presented that any other such group has asserted the right. *Id.*
>
> The Court finds that it was reasonable for defendants to consider the possibility that a large number of religious, political, or philosophical groups might seek access to school facilities while students were still present for school-related after school activities. Even though no evidence was presented that hate groups or other controversial groups planned to seek access under the 1986 Use Policy, 'the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum.' *Cornelius*, 473 U.S. at 810.

_____ F.Supp. at _____-_____ (Dist.Ct.Op. at 14-15).

These are valid reasons presented by the Board for its present policy. While the Board had not received a request for access from any "hate" group, it concluded reasonably that permitting the Club to use the Junior High School immediately after the school day would open the door to all parent-sponsored religious groups for children, including those whose speech most people would consider morally

bankrupt.[5] This concern does not relate to an idle threat. The Supreme Court recently emphasized the obligation of government to act neutrally toward religious choices, calling it a principle "at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, _____ U.S. _____, _____, 114 S.Ct.

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5. Hate speech is frequently cloaked in the garb of religion. Individuals associated with groups such as the KKK, Aryan Nation, and Nation of Islam have asserted religious underpinnings for their racist views. In *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985), prisoners belonging to the Church of Jesus Christ Christian (CJCC) claimed deprivation of free exercise rights. We held that groups such as the CJCC and Sword of Christ Good News Ministries, both of which "advocate racial purity and believe that race mixing is a sin which is contrary to Biblical teachings," *id.* at 665, are arguable "religious" entities for first amendment purposes. We also noted that other belief systems, including that held by the Black Muslims, espouse racial separation or superiority. *Id.* at 667 n.6. *See also McCabe v. Arave*, 626 F.Supp. 1119 (D. Idaho 1986) (Church of Jesus Christ Christian, the religious "alter ego" of the Aryan Nation, teaches that white Anglo-Saxons are to be kept separate from all other "mongrel" races, and that race war is inevitable); *Brown v. Dade Christian Schs.*, 556 F.2d 310 (5th Cir. 1977) (en banc) (Goldberg, J., concurring) (finding substantial evidence that private school based its whites-only policy on Christian beliefs of school administrators); *Invisible Empire, KKK v. Mayor of Thurmont*, 700 F.Supp. 281 (D.Md. 1988) (noting KKK's position that permitting blacks to march with KKK would be hypocrisy because the KKK supports segregation on religious grounds); *Lee v. Crouse*, 284 F.Supp. 541 (D.Kan. 1967) (Black Muslim sect which espoused separationism and belief in ultimate holy war with whites, is derived from Islamic teachings and should be considered a religion).

In a recent speech given at Kean College in New Jersey, Khalid Abdul Muhammed, the Nation of Islam's former national spokesman, vilified Jews, Roman Catholics, homosexuals, whites in general, and some blacks. New Jersey Law Journal, Jan. 24, 1994, at 17. Specifically, Muhammed labeled Jews "bloodsuckers of the black nation". *Id.*

2481, 2491 (1994). The Board acted reasonably to prevent school facilities from turning into a religious battleground for parents and youngsters during the noninstructional part of the school day.

II. WHETHER THE CLUB AND THE SCOUTS ARE SO SIMILAR THAT VIEWPOINT DISCRIMINATION EXISTS BECAUSE SCOUTING IS PERMITTED ON SCHOOL PREMISES FROM 3 TO 6 P.M.

That both the Club and the Scouts may be concerned with moral development does not make their activities necessarily similar. Moral development is often in the eye of the beholder. Groups espousing radically different ideologies, such as pro-life and pro-choice advocates, both lay claim to moral authority and righteousness. Proponents as well as opponents of sex education in the public schools make similar claims of concern for the moral development of children. Many other examples exist of both sides to controversial issues making claim to high moral grounds supporting diametrically opposed conclusions.

Here, the majority seizes upon an isolated sentence from the district court opinion regarding moral development to draw a conclusion that "[b]ecause both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy [1992 Policy]." *Ante*, at 1506.

However, the following is the complete factual analysis by the district court supporting its determination that Scouting activities are distinctly different from the Club's activities:

The evidence presented at trial supports a finding that the Scouts are primarily a secular organization engaging in secular activities. The purpose of Scout meetings is for the young persons involved to have fun, to support the ideals of Scouting, education, and reinforcement of moral values. Although Scouts may earn religion badges, those badges are earned at home or in the scout's place of worship.

Scouting activities include camping, woodworking, swimming, non-religious games, and other secular, skill-oriented activity. Other than the single reference to God in the Scout oath, all activity at Scout meetings is of a secular nature. A review of the Scout manuals introduced into evidence reveals limited reference to God, to the 'Great Master' or to reverence. The great majority of the manuals is devoted to describing different Scouting activities and skills as well as how to earn merit badges. The descriptions of the purpose of Scouting do not include any reference to God or to religion.

The Club, by contrast, was initiated to teach the young members Christian values. Each parent who testified at trial testified to the importance of the religious aspect of the Club and that a purpose of the Club was to pass along Christian faith and morality to the student members of the Club. A typical Club meeting consists of an opening prayer, snack, activity, Bible lesson, and closing prayer. Plaintiff Chris Hirt testified in his deposition that he liked the Club because it gave him an opportunity to relate to Christian friends and that it was important to keep the Club going *so that others might become*

Christian. Deposition of Chris Hirt, taken October 27, 1992, at 18.[6]

> Although both the Club and the Scouting program are concerned with the moral development of youth, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith. Any incidental reference to God or the 'Great Master' does not convert the secular nature of the Scouts into a religious nature. *Lamb's Chapel*, 959 F.2d at 388. The Court, therefore finds that the Club and the Scouts are not of a similar character. Accordingly, even were the Court to find that a limited pubic forum was created from 3:00 to 6:00 p.m., the Club could not claim a right to access to the School District facilities during that time.

_____ F.Supp. at _____-_____ (Dist.Ct.Op. at 20-21) (emphasis added).

The majority does not fault the district court's finding, which, upon careful review of the record, is unquestionably correct. Scouting is a secular, skills-oriented activity analogous to and supplementary to learning which takes place in the public school classroom. The Club is a sectarian, worship-oriented activity which seems more analogous to a church-operated Sunday school for junior high youngsters.

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6. Chris Hirt's deposition reflects his belief that proselytization is one of the Club's functions.

Finally, *Lamb's Chapel*, upon which the majority places primary reliance, is distinguishable from this case in several crucial respects, undermining the majority's analysis. In *Lamb's Chapel*, an *adult* Church group sought access to a local public high school *at night* to present a film series on the subject of parenting and family values; the series approached this subject from a religious perspective.

The Center Moriches School District's policy permitted community access to its schools for "social, civic, or recreational uses" and "use by political organizations." The Center Moriches policy also provided that school premises could not be used by any group for religious purposes. The Supreme Court determined that exhibiting a film *on the subject of parenting and family values* could not be excluded from the forum because the subject matter had not been placed off limits by the school district. The Court noted the similarities between other programs permitted at the forum at that hour and the Church's film series, and held that these programs demonstrated that the "subject matter" had been *included* in the forum: "The film involved here no doubt dealt with a subject otherwise permissible under [the policy], and its exhibition was denied solely because the film dealt with the subject from a religious standpoint." *Lamb's Chapel*, _____ U.S. at _____, 113 S.Ct. at 2141.

The same cannot be said for the Club's efforts to bring its program within the Ladue School District's 1992 Policy. The only "subjects" permitted were those "expressed" through athletics and Scouting activities. Neither athletic activities nor Scout meetings included "speech" on the subject of moral development as an integral part of their programs. The possible *effect* of Scout activities on a child's character (e.g., moral development) does not transform those activities into "speech" on the subject matter of the "moral

development of youth." Unlike the subject matter presented by the Lamb's Chapel group, the entire subject matter of the Club's speech activities had been excluded from the school premises at the relevant time.

Further, *Lamb's Chapel* presented none of the special concerns involved in the Ladue School District's decision to adopt its 1992 Policy. The Ladue policy concerns (1) youths of an impressionable age; and (2) use of school facilities immediately after government-mandated attendance ends, *while* some children are attempting to leave school premises, and *during* the time in which other children are engaged in school-sponsored activities. Because the Lamb's Chapel group sought to use the local high school to show a film series *for adults at night*, when no school children were present for school-sponsored activities, its film series did not place young children in the position of having to determine whether the state endorsed the views expressed in the program.[7]

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7. The majority adopts the somewhat theoretical view that to avoid constitutional endorsement, schools must simply state to their students that the school does not endorse all that it permits: If pupils do not comprehend so simple a lesson, then one wonders whether the [ ] schools can teach anything at all." *Ante*, at 1509 (quoting *Hedges v. Wauconda*, 9 F.3d 1295, 1300 (7th Cir. 1993)). This statement neglects two important facts: first, with many of our public schools struggling to teach basic literacy and math skills, it is hard to imagine schools devoting much time to explicating the psychology of governmental endorsement; second, the "lesson" to be taught is far from simple, as reflected in our current jurisprudence of fine, sometimes imperceptible, Establishment Clause distinctions. *Compare County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (creche placed on Grand Staircase of Allegheny County Courthouse with sign reading "Glory to God in the highest" violated Establishment Clause, but display outside City-County Building featuring menorah, Christmas tree and sign saluting liberty did not) *with Lynch v. Donnelly*, 465 U.S. 668 (1984) (creche as part of

(continued...)

Because its factual context differs so greatly from that presented here, *Lamb's Chapel* does not control the outcome of this case. The 1992 Policy does not discriminate on the basis of viewpoint.

III. SUMMARY AND CONCLUSION

The Ladue School Board, as is the case with school boards generally, is called upon to make difficult policy decisions. In this case, the use of school facilities by the Club produced problems for some parents. The Board gave contending persons a full hearing and received legal advice in this sensitive area of school-religion relationships. The Board thereafter adopted a policy which in essence said to members of the Club (and all other adult-led religious groups), you may meet on school premises after 6 p.m. on school days. The Club, deprived of its more convenient location (and more captive audience) between 3 and 4 p.m., objected and brought this action.

In my view, the majority has wrongly ruled that the Board must allow the Club to use the facilities of the school between 3 and 4 p.m. Under the majority's holding, the Board must permit access at 3 p.m. to any group claiming to

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7.(...continued)
larger Christmas display in City park did not violate Establishment Clause). *Also compare Lee v. Weisman, supra* (Establishment Clause forbids school district from having clergy member offer prayer as part of public school graduation ceremony) *with Marsh v. Chambers*, 463 U.S. 783 (1983) (Establishment Clause does not forbid opening state legislative session by having clergyman lead a prayer).

Moreover, given the somewhat proselytizing message passed out to these young students, actions may speak louder than words to the students who may see an endorsement of religious views were none is intended by the Board.

further the moral development of youth, regardless of that group's irrational or fanatical underpinnings, *see supra* at 1514 n.4. And who is likely to suffer? The students, the Scouts, perhaps community athletic groups, for the only way to assuredly sidestep the controversial issues here is to bar *all* community activities from the forum between 3 and 6 p.m. The Club, however, is not harmed by the Board's action. It may meet, as it has in the past, at another location, or it may choose to meet after 6 p.m. at the school.

This court's interference with the School Board's essentially neutral policy regulating community group access during the school day is, in my view, the wrong kind of judicial intervention in the Ladue School District's business. The district court, in a logical opinion supported by ample legal authority, agreed with the Board's right to adopt the 1992 Policy. I agree emphatically with the district court's disposition of this matter rejecting the constitutional challenge to the school policy by the Good News Club.

APPENDIX B

United States Court of Appeals
For The Eighth Circuit

No. 93-2148EMSL

The Good News/Good Sports Club, et al., Appellants, vs. School District of the City of Ladue, et al., Appellees.	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

September 29, 1994

Order Entered at the Direction of the Court:

MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

No. 4:92CV001813 ELF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE GOOD NEWS/GOOD SPORTS CLUB, JORDAN HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, PAT CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER, and L. CORBETT HEIMBURGER,

Plaintiffs,

v.

THE SCHOOL DISTRICT OF THE CITY OF LADUE, BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, and CHARLES MCKENNA, in their individual capacities,

Defendants.

MEMORANDUM

This matter is before the Court for a decision on the merits after trial to the Court. After consideration of the

pleadings, the testimony and exhibits introduced at trial, the parties' briefs, and the applicable law, the Court enters the following memorandum which it adopts as its findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

Plaintiffs brought this action for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, alleging that the Use of Premises Policy adopted on July 20, 1992, ("Amended Use Policy") by defendant Ladue School District ("School District") violates plaintiffs' rights under the First Amendment of the United States Constitution. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and has authority to enter declaratory and injunctive relief in the event a constitutional violation is found. 28 U.S.C. §§ 2201, 2202. Additionally, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

Plaintiffs' action is in two counts: Count I alleges violation of the Free Speech clause of the First Amendment;

Count II alleges violation of the Religion Clauses of the First Amendment. In support of their Free Speech claim, plaintiffs present the following legal theories: (1) that the Amended Use Policy is facially discriminatory based on the content of an organization's speech; (2) that plaintiffs have standing to assert the First Amendment rights of Scout programs based on the facially discriminatory no-religion proviso of the Amended Use Policy; and (3) that defendants acted with an unconstitutional motive when they amended the School District's use of premises policy and that this allegedly unconstitutional motive invalidates the Amended Use Policy. In support of their claims under the religion clauses of the First Amendment, plaintiffs present the following legal theories: (1) that the Amended Use Policy is unconstitutional on its face and that plaintiffs have third party standing to raise this issue; and, (2) that the Amended Use Policy is not neutral, in purpose or effect, as to religion and

the Policy thus violates the First Amendment's Religion Clauses.

The School District of the City of Ladue ("School District") is a public, six director, school district created pursuant to Missouri law. The individual defendants are current members of the Ladue School Board ("Board" or "School Board"); there is one vacancy on the present Board. The Good News/Good Sports Club ("Club") is a voluntary unincorporated association made up of students and parents residing within the School District. Although the Club is nondenominational, the purpose of the Club is to provide junior high school age children an opportunity to experience constructive interaction with peers and to examine the moral values taught by Christianity. An additional purpose of the Club is to provide one means by which the parent sponsors of the Club can pass on their Christian religious beliefs to young persons.

The format of a typical Club meeting includes an opening prayer, snack, some activity, (such as a skit), singing of Christian songs, a discussion based on a Bible reading, and a closing prayer. Some individual plaintiffs are students who have attended meetings and/or would like to attend meetings of the Club in the future. The remaining individual plaintiffs are parents of students residing within the School District whose children have attended Club meetings in the past and/or would like to attend meetings in the future. Those parents would like their children to attend Club meetings.

The Club has its roots in religious clubs for children and adolescents initiated in the late 1970's by Jane Cunningham, a former Board member of the School District.[1] Ms. Cunningham formed the Good News Club[2]

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1. Ms. Cunningham was not reelected at the election for Board Members in April, 1992.

while her child was a student at Reed Elementary School, an elementary school within the School District. The Club traditionally met once a month after school either in Ms. Cunningham's home or the home of another interested adult. The students attending those Club meetings did not utilize School District modes of transportation to get home after the meeting.

The Club began meeting after school at Ladue Junior High School in December, 1988. Ms. Cunningham, or other Club sponsors, applied for permits for the Club to meet at the Junior High School and those permits were granted by defendant Dr. Charles McKenna, Superintendent of the School District. The Club met once a month directly after school for the remainder of the 1988-89 school year and for

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2. The Club has been known by various names, including, but not limited to, the Good Sports Club and Good News Club, the Good Sports Boys Club, Girls Good News Club. No party contends that these various clubs were not predecessors to the plaintiff Club.

the 1989-90, 1990-91 and 1991-92 school years. Some, but not all, of the permit applications included the name "Good News" as the title of the group seeking access. The first application to include the word "Bible" or to clearly indicate that the group met for religious purposes was the application filed by plaintiff L. Corbett Heimburger for the 1991-92 school year.

At its public meeting on February 10, 1992, the School Board heard complaints from two parents regarding alleged recruitment of their children to attend Club meetings. The Board also heard comments in support of the Club. The Board directed its attorney to look into the issue of access by religious groups to School District facilities and to examine the Use of Premises Policy adopted in 1986 ("1986 Use Policy"). Citizen comments both for and against access to School District facilities by the Club, comments regarding the nature of the Club, and further discussion regarding the

1986 Use Policy occurred at Board meetings from February, 1992, through July, 1992.

The 1986 Use Policy allowed access to any community or student organization upon application for a permit and depending on availability of space. The attorney for the School District reported at the Board meeting on March 11, 1992, that the 1986 Use Policy might violate the Establishment Clause of the First Amendment. The School District's attorney ultimately recommended adoption of the Amended Use Policy, which was in fact adopted by the Board, in closed session, on July 20, 1992. The Amended Use Policy provides that community groups will be permitted to use School District facilities, upon application for a permit, after 6:00 p.m. on school days and after 8:00 a.m. on other days. The Amended Use Policy also provides, in relevant part:

> Permission for use of school facilities after instructional time ends on school days will be granted to Community Groups: (1) for use of

> District's athletic facilities, provided that the use is limited exclusively to athletic activities; and (2) for meetings of Scouts (Girl, Boy, Cub, Tiger Cub, and Brownies), provided that such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs.

Subsequent to adoption of the Amended Use Policy, the Club, through plaintiff L. Corbett Heimburger, submitted an application to meet on the first Monday of each month for the 1992-93 school year from 3:00 to 4:00 p.m. Plaintiffs' application was not approved because no group, except Scout groups and groups using the athletic facilities, are allowed to meet until after 6:00 p.m. on school days under the Amended Use Policy. Plaintiffs then brought this action alleging that the restriction on access violates the First Amendment.

Any analysis of whether government regulation restricting access to government property violates the Free Speech Clause of the First Amendment must begin with an analysis of the type of forum to which access is restricted. Initially, this Court "must identify the nature of the forum,

because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). This Court must determine whether the School District has opened its facilities to the community for expressive activity and, if so, whether the forum thereby created should be categorized as a traditional public forum, a nonpublic forum, or a limited public forum. Following determination of the type of forum, this Court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard" of review of the government regulation. *Id.*

No party contends that the School District facilities are traditional public fora. The designation of traditional public forum is reserved for those places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing

public questions." *Hague v. Committee for Indust. Org.*, 307 U.S. 496, 515 (1939). Public school facilities, in contrast, are nonpublic government property which "may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' . . . or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)). A public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

The analysis of government property must include "consideration of a forum's special attributes . . . since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron v. International Soc'y for Krishna*

Consciousness, Inc., 452 U.S. 640, 650-51 (1981); *Perry Educ. Ass'n*, 460 U.S. at 44 ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

Public school facilities function to meet the educational needs of the students within the school district and a school district "must . . . retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood School Dist.*, 484 U.S. at 272. Periodic access by "private non-school-connected groups" does not necessarily convert the nonpublic nature of a public school facility into either a public forum or a limited public forum. *Perry Educ. Ass'n*, 460 U.S. at 47. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.*, 460 U.S. at 49.

Government regulation of a traditional open forum must be "narrowly tailored, content-neutral [and] pertain[ ] to the time, place and manner of expression . . .." *Center Moriches Union Free School Dist.*, 959 F.2d 381, 386 (2d Cir.), cert. granted, 113 S.Ct. 51 (1992). Those regulations will be upheld under First Amendment scrutiny only "if they 'serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Where, by permitting access to designated groups, the state has created a limited public forum, the First Amendment protections afforded to a traditional public forum apply, but "the constitutional right of access . . . extend[s] only to other entities of similar character." *Perry Educ. Ass'n*, 460 U.S. at 47-48. Regulations of nonpublic government property are constitutional as long as they are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views." *Id.* at

46 (citation omitted). Finally, where the state has created a public or limited public forum, the state "is not required to indefinitely retain the open character of [a] facility . . .." *Id.*

In *Perry Educ. Ass'n*, the United States Supreme Court found that teacher mailboxes in a public school were nonpublic fora. The mailboxes were not open for general public access, although certain community groups, such as the YMCA, Scouts, and other civic organizations, were granted periodic access to the mailboxes. 460 U.S at 47. The Supreme Court held that "[t]his type of selective access does not transform government property into a public forum." *Id.* The Supreme Court further held that restrictions based on subject matter and speaker identity are permissible in a nonpublic forum and that such distinctions "are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the

purpose which the forum at issue serves." 460 U.S at 49. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (holding that subject matter discrimination excluding political speech in a nonpublic forum is permissible; viewpoint discrimination is not permissible).

The 1986 Use Policy created a limited public forum. Any group was permitted to apply for access, which was limited to after school hours and non-school days. The School District, however, retained the right to close the forum and, in adopting the Amended Use Policy, closed the Ladue school facilities until after 6:00 p.m. on school days. Plaintiffs do not contend that the School District did not have the right to close the facility, but that the Amended Use Policy did not have the effect of changing the nature of the forum from a limited public forum to a nonpublic forum. Plaintiffs contend that, because access to the athletic facilities

and by Scouting programs[3] is still allowed immediately after school hours, the School District facilities remain a limited public forum. The Court disagrees.

The reason given by the School Board for allowing access to Scouts immediately after school hours is that the School District has a "long-standing tradition of cooperation with scout programs . . .." Defendant's Ex. L. The Court finds this explanation valid and reasonable. This type of selective access to a community group with a long-standing relationship with the School District does not convert the nonpublic forum of public school facilities into a limited public forum. Scouting activities are compatible with the purposes of public education and, especially in light of the School District's long term relationship with the Scouts, the

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3. Although the Amended Use Policy allows access immediately after instructional time only to athletic facilities and by the Scouts, plaintiffs' arguments that the policy creates a limited public forum focuses on the access granted to the Scouts.

Court finds that limiting access to Scouting groups is reasonable. During the period of 3:00 to 6:00 p.m., the School District facilities are not open "for indiscriminate use by the general public . . .." *Perry Educ. Ass'n*, 460 U.S. at 47. The facilities are available only for selective access by Scouts and by those wishing to use the athletic facilities. Under the facts of this case, the Court finds that the Ladue Public School facilities are a nonpublic forum from 3:00 to 6:00 p.m.

Because the Court finds that the Amended Use Policy does not create a limited public forum, but that the School District facilities are a nonpublic forum from 3:00 to 6:00 p.m., the restriction on plaintiffs' access immediately after instructional time must only meet the standard of reasonableness. The reasonableness standard is met "when the applicable restrictions 'reflect a legitimate government concern and do not suppress expression merely because public officials oppose the speaker's view.'" *Lamb's Chapel*,

959 F.2d at 386 (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)). Furthermore, "the restriction 'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'" *International Soc'y for Krishna Consciousness v. Lee*, _____ U.S. ____, 112 S.Ct. 2701, 2708 (1992) (emphasis in original) (quoting *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion)).

If the justifications given are facially reasonable, the Court must then determine whether the proffered reasons are mere pretext for viewpoint discrimination. *Cornelius*, 473 U.S. at 797. Although the government may restrict access to a non public forum based on the subject matter of speech, the Court must determine whether the restriction "conceal[s] a bias against the viewpoint advanced by the excluded speakers." *Id.*, 473 U.S. at 812.

One reason provided by the School District for amending the 1986 Use Policy is that the type of access

allowed under the 1986 Policy might violate the Establishment Clause of the First Amendment. Plaintiffs contend that the 1986 Policy did not violate the Establishment Clause. The question whether or not the 1986 Policy violated the Establishment Clause, however, is not before this Court; this Court must determine only whether defendants' concern over a possible constitutional violation, resulting in closing the limited public forum from 3:00 to 6:00 p.m., was a true reason and a reasonable justification for amending the 1986 Use Policy.

In a recent case involving a claim of violation of the Establishment Clause, the Supreme Court held:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

Lee v. Weisman, _____ U.S. _____, _____, 112 S.Ct. 2649, 2655 (1992).

In a number of cases, United States Courts have found Establishment Clause violations where access to school district facilities by religious groups was allowed. In *Bell v. Little Axe Indep. School Dist. No. 76*, 766 F.2d 1391 (10th Cir. 1985), the court recognized "the special concern for religious neutrality in the public school setting[.]" *Id.* at 1402. The court held that the school violated the Establishment Clause when it allowed religiously-oriented student meetings in the school before classes began. *Id.* at 1407. In *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir.), reh'g denied, 680 F.2d 424 (1982), cert. denied, 459 U.S. 1155 (1983), the court found an Establishment Clause violation where a school district policy permitted students to gather either before or after school hours for Bible readings and other religious activity.

In a case with facts similar to the instant case, a district court found that permitting a Bible study club to meet immediately after classes would have violated the Establishment Clause. *Quappe v. Endry*, 772 F.Supp. 1004 (S.D. Oh. 1991), aff'd, 979 F.2d 851 (6th Cir. 1992). Although the facts of these and other cases may be distinguishable from the facts in the instant case, this does not diminish the reasonableness of defendants' concern regarding a possible Establishment Clause violation under the 1986 Use Policy. The credible evidence at trial was that the School Board had received complaints from some parents and citizens within the School District regarding meetings of the Club directly after school. At least one parent complained that her child had been approached and solicited by another student to attend meetings of the Club.

Plaintiffs contend that the fear of an Establishment Clause violation was not reasonable and was not a valid consideration when the School Board amended the Use

Policy to restrict plaintiffs' after school access. The United States Court of Appeals for the Eighth Circuit, however, has found that concern regarding an Establishment Clause violation is a "reasonable justification" for placing restrictions on access to school facilities for religious groups. *Salinas v. School Dist. of Kansas City*, 751 F.2d 288, 290 (8th Cir. 1984). Under the circumstances of this case, and in light of relevant Establishment Clause case law, the Court finds that defendants' concern was reasonable.

Defendants also assert they were concerned that a number of religious groups, hate groups, and/or other controversial groups might seek access immediately after school hours under the 1986 Use Policy. The record does not reflect that any such group had sought access under the 1986 Policy. It is proper, however, for a state to consider the possible large number of groups which might seek access to state facilities. *Heffron*, 452 U.S. at 653. In *Heffron*, the International Society for Krishna Consciousness ("ISKCON")

challenged a Minnesota state regulation restricting solicitation at the state fair to designated booths. ISKCON contended that this restriction infringed its First Amendment right to proselytize and raise funds for its religious organization. In upholding the state regulation, the Supreme Court recognized that it was proper for the state to consider the possibility that all other groups at the state fair might also seek to solicit from the general public by walking through the fairgrounds although no evidence was presented that any other such group had asserted the right. *Id.*

The Court finds that it was reasonable for defendants to consider the possibility that a large number of religious, political, or philosophical groups might seek access to school facilities while students were still present for school-related after school activities. Even though no evidence was presented that hate groups or other controversial groups planned to seek access under the 1986 Use Policy, "the

Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Cornelius*, 473 U.S. at 810.

Plaintiffs contend that the restriction on access to the school facilities until after 6:00 p.m. violates their Free Speech rights because it is more convenient for the Club to meet immediately after school and because the Club will be destroyed if denied access immediately after school. In support of their convenience argument, plaintiffs presented credible evidence that School District transportation was available to members of the Club when they met immediately after school. If the Club is not allowed to meet at the school until after 6:00 p.m., the Club will be required to find an alternative after-school meeting place and to arrange for transportation for students to return home after the meeting.

The Court finds credible plaintiffs' evidence that an after school meeting at the school facility is more convenient to the Club and its members than an evening meeting or a meeting at a non-school facility. Restriction of access to a

nonpublic forum, however, need only be reasonable. Once the Court finds that the regulation is valid and reasonable, the Court need not determine whether other, more reasonable, alternatives are available. Additionally, plaintiffs' "convenience" argument is not persuasive because access to a nonpublic forum is not required by the First Amendment merely because that forum is "the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809.

As to plaintiffs' contention that the Club will be destroyed if not allowed access from 3:00 to 4:00 p.m., the Court finds that the evidence does not support this assertion. For several years prior to meeting at the Ladue Junior High School, the Club met in private homes after school or in the evening. Transportation for the Club members was provided by parents. Each parent to testify at trial testified to the importance of the Club to them and to their children. The minor plaintiffs who testified also stated that the Club was

very important to them and that they wanted to continue to attend Club meetings. Each parent and student testified to the variety of after-school and evening activities in which the students were involved. The students and their parents managed to arrange transportation to all of these other activities. Although the Court does not doubt that some difficulties will arise in arranging for meetings of the Club, the Court does not find credible the assertion that the Club will be destroyed by any such inconvenience.

The Court thus finds that the Amended Use Policy did not create a limited open forum from 3:00 to 6:00 p.m., but that the School District facilities are a nonpublic forum during that time period. The Court also finds that the School Board's justifications for closing the forum during those hours were reasonable. The Court must now determine whether, although facially reasonable, those justifications were merely a facade for viewpoint based discrimination.

Plaintiffs contend that the sole reason defendants amended the Use Policy was to oust the Club from meeting in school facilities and to destroy the Club. Plaintiffs presented evidence, as did defendants, that criticism from some members of the community about the religious nature of the Club was the catalyst for amending the Policy. The Court finds that the citizen comments and complaints about the Club were the primary factor leading to the School Board's examination of the 1986 Use Policy and eventual adoption of the Amended Use Policy. This finding, however, does not mean that the School Board engaged in unconstitutional discrimination in closing the school facilities immediately after school.

A public school district must "retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood School Dist.*, 484 U.S. at 272. Furthermore, this Court should be "reluctan[t] to attribute unconstitutional

motives to the States, particularly when a plausible secular purpose . . . may be discerned" for the State's action. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

The Court has found reasonable the School Board's concern that continued access by the Club immediately after school might result in an Establishment Clause violation. The complaints raised by citizens included concern that the group met immediately after school. Evidence was presented, and the Court finds, that members of the School Board believed that an appearance of endorsement by the School District of the religious views of the Club could result from the Club meeting immediately after school. An appearance of endorsement might violate the Establishment Clause requirement that the state remain neutral on matters of political or religious controversy. See *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 266 (1990) (Marshall, J. and Brennan, J., concurring) ("Neutrality toward religion, as required by the Constitution,

is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well.").

The Court further finds that no evidence supports plaintiffs' contention that the School Board acted with the intent to destroy the Club because of its religious activities. All of the evidence presented supports the conclusion that the Board heard evidence both pro and con regarding the Club; that all comments were seriously considered by the Board members; and that the Board members sought legal advice from their attorney as how best to meet the needs of the community without risking a constitutional violation. The Court finds no credible evidence to support a finding that the School Board acted with an unconstitutionally discriminatory motive in amending the Use Policy.

The Court thus finds that the Amended Use Policy does not create a limited public forum from 3:00 to 6:00 p.m., that the restriction on access to School District facilities is

reasonable, and that the policy was adopted for constitutionally permissible reasons. Even if the Court were to find that the Amended Use Policy creates a limited public forum during the period immediately after instructional time because of the access allowed by the Scouts and to athletic facilities, plaintiffs must prove that the Club is similar in character to the limited groups allowed access.[4] *Perry Educ. Ass'n*, 460 U.S. 37, 47-48 (assuming the existence of a limited public forum, "the constitutional right of access would in any event extend only to other entities of similar character.").

The evidence presented at trial supports a finding that the Scouts are primarily a secular organization engaging in secular activities. The purpose of Scout meetings is for the

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4. Plaintiffs make no argument regarding their similarity to groups using the athletic facilities and no evidence was presented regarding the character of any such group. The Court will limit its discussion on this issue to the characteristics of the Club and the Scouts.

young persons involved to have fun, to support the ideals of Scouting, education, and reinforcement of moral values. Although Scouts may earn religion badges, those badges are earned at home or in the scout's place of worship.

Scouting activities include camping, woodworking, swimming, non-religious games, and other secular, skill-oriented activity. Other than the single reference to God in the Scout oath, all activity at Scout meetings is of a secular nature. A review of the Scout manuals introduced into evidence reveals limited reference to God, to the "Great Master" or to reverence. The great majority of the manuals is devoted to describing different Scouting activities and skills as well as how to earn merit badges. The descriptions of the purpose of Scouting do not include any reference to God or to religion.

The Club, by contrast, was initiated to teach the young members Christian values. Each parent who testified at trial testified to the importance of the religious aspect of the Club

and that a purpose of the Club was to pass along Christian faith and morality to the student members of the Club. A typical Club meeting consists of an opening prayer, snack, activity, Bible lesson, and closing prayer. Plaintiff Chris Hirt testified in his deposition that he liked the Club because it gave him an opportunity to relate to Christian friends and that it was important to keep the Club going so that others might become Christian. Deposition of Chris Hirt, taken October 27, 1992, at 18.

Although both the Club and the Scouting program are concerned with the moral development of youth, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith. Any incidental reference to God or the "Great Master" does not convert the secular nature of the Scouts into a religious

nature. *Lamb's Chapel*, 959 F.2d at 388. The Court, therefore, finds that the Club and the Scouts are not of similar character. Accordingly, even were the Court to find that a limited public forum was created from 3:00 to 6:00 p.m., the Club could not claim a right to access to the School District facilities during that time.

Plaintiffs' final argument on their Free Speech claim is that the Amended Use Policy is facially unconstitutional because of the no-religion proviso for use by the Scouts. Plaintiffs contend that they have standing to assert the constitutional rights of the Scouts under the "overbreadth doctrine." In order for a party to have standing to assert a constitutional claim, Article III of the United States Constitution generally requires a party to show some actual or threatened injury to that party that is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The Supreme Court has

determined that, under some circumstances, a party may challenge the constitutionality of a statute that is facially overbroad.

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court -- those who desire to engage in legally protected expression -- but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

Board of Airport Comm'r v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). In order for a statute or regulation to be found facially unconstitutional under this doctrine, the statute must be "substantially" overbroad. *Id.*

Plaintiffs do not have standing to assert the alleged First Amendment rights of the Scouts under the overbreadth doctrine. First, plaintiffs have failed to show that their "own speech or conduct may be prohibited" under the no-religion proviso to Scout meetings. This Court has

determined that the School District acted constitutionally in restricting access to school facilities immediately after instructional time. Plaintiffs have no right to access under the Amended Use Policy from 3:00 to 6:00 p.m. The no-religion proviso applies only to Scouts and does not prohibit plaintiffs' speech.

Additionally, the Court finds that the no-religion proviso is not "substantially" overbroad. The regulation at issue in *Jews for Jesus* "reache[d] the universe of expressive activity, and, by prohibiting all protected expression, purport[ed] to create a virtual 'First Amendment Free Zone' . . .." 482 U.S. at 574 (emphasis in original). The no-religion proviso reaches only religious speech. In a nonpublic forum the state may restrict speech based on its content, and the Court finds that, under these circumstances, the proviso is not overbroad. Thus, the Court finds plaintiffs do not have standing to chal-

lenge the no-religion proviso, and the Court will not address any constitutional claim regarding the proviso.[5]

For all of the reasons stated herein, the Court finds for defendants on Count I of plaintiffs' complaint. The Court now turns to Count II wherein plaintiffs allege that the Amended Use Policy violates the Religion Clauses of the First Amendment. Plaintiffs contend that the Amended Use Policy is not neutral, in purpose or effect, as to religion and thus violates both the Establishment Clause and the Free Exercise Clause.

The First Amendment forbids all laws "prohibiting the free exercise" of religion. U.S. Const. Amend. I. The Free Exercise Clause prohibits the government from regulating, prohibiting, or rewarding any religious belief. *Sherbert v.*

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5. Plaintiffs raise this same issue in Count II of their complaint. The Court will not address this issue again, but holds that for the same reasons plaintiffs lack standing to contest the constitutionality of the proviso as a violation of Free Speech, they also lack standing to contest the proviso as a violation of the religion clauses.

Verner, 374 U.S. 398, 402 (1963). Free Exercise of religion "means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'" *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (emphasis in original) (quoting *Sherbert v. Verner*, 374 U.S. at 402).

"[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . .." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Plaintiffs do have a First Amendment right, under the Free Exercise Clause, to meet as a religious Club and to pass on the values and precepts of Christianity. This Court must determine whether the Amended Use Policy unconstitutionally regulates or prohibits plaintiffs' free exercise of religion.

This Court has found, in the context of Free Speech analysis, that the Amended Use Policy is not an unconstitutional regulation of plaintiffs' speech. Neither does the Amended Use Policy regulate or prohibit plaintiffs' free exercise of religion. Plaintiffs are free to meet and practice their religious beliefs without being refused any right provided to other citizens within the School District. Although plaintiffs do enjoy a free exercise right to meet as a religious Club, that right is not infringed by the requirement that, if plaintiffs wish to exercise the right in School District facilities, they must comply with the valid regulations on the use of those facilities. Additionally, plaintiffs' right to free exercise of their religion does not include a right to engage in that exercise in the School District's facilities from 3:00 to 6:00 p.m. Accordingly, the Court finds for defendants on plaintiffs' Free Exercise claim.

Finally, plaintiffs claim that the Amended Use Policy violates the Establishment Clause because it is facially non

neutral as to religion. A state statute or regulation is valid under the Establishment Clause if "(1) it has a 'secular . . . purpose,' (2) 'its . . . primary . . . effect . . . neither advances nor inhibits religion,' and (3) it does not 'foster an excessive government entanglement with religion.'" *Mergens v. Bd. of Educ. of Westside Community Schools*, 867 F.2d 1076, 1079 (8th Cir. 1989) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Plaintiffs contend that, in restricting access to plaintiffs and other religious organizations, the School District demonstrates hostility toward religion and thus violates the Establishment Clause. The Court disagrees.

This Court has found, in its analysis of this case under the Free Speech clause, that defendants did not amend the 1986 Use Policy because of an unconstitutionally discriminatory motive. The Court finds that the School District acted with the valid secular purpose to maintain the school facilities as a nonpublic forum from 3:00 to 6:00 p.m.

and to avoid the appearance of taking "any position other than neutrality on matters of [public] controversy." *Hazelwood School Dist.*, 484 U.S. at 272. Although defendants were concerned with an appearance of non-neutrality based on religion, this concern does not convert the valid secular purpose into a non-secular purpose.

Secondly, the primary effect of the Amended Use Policy neither advances nor inhibits religion. The policy is neutrally applied to all religious, political, and philosophical groups. The primary effect of the policy was to create a nonpublic forum from 3:00 to 6:00 p.m. on school days. All community groups, with the exception of Scouts and groups using the athletic facilities, are excluded from use of School District facilities from 3:00 to 6:00 p.m., regardless whether the group is of a religious or secular nature. Plaintiffs contend that the policy inhibits religion because of the inconvenience to the Club of making alternative arrangements for student meetings. This effect, however, is not the

principal or primary effect of the Amended Use Policy, but is merely incidental to the primary effect.

Finally, the Amended Use Policy does not foster an excessive entanglement with religion. Plaintiffs urge that an excessive entanglement must occur because the School Board will be required to monitor the Scout meetings to ensure that the Scouts comply with the no-religion proviso. The Board, however, contends that no entanglement will occur because it is not necessary for the Board to monitor the content of the Scout meetings. The Board expects that the Scouts, as well as any other group using School District facilities, will comply in good faith with any restrictions on that use. This Court finds that plaintiffs have been unpersuasive on the issue of excessive entanglement. Plaintiffs have failed to establish that any greater obligation to monitor the use of school district facilities arises from the no-religion proviso than from any other rule or regulation governing use of the

facilities. Thus the Court finds that no excessive entanglement with religion has been established.

Furthermore, under the Free Speech clause analysis, this Court found that the School District acted with constitutional motives and valid reasons when it decided to close the forum from 3:00 to 6:00 p.m. The purpose was not to inhibit plaintiffs' practice of religion, but to meet the various needs of all members of the community. Additionally, the School Board acted with concern about the appearance of non-neutrality based on religion. This concern, valid for purposes of Free Speech analysis, should not now be construed as resulting in an unconstitutional

effect of inhibiting religion. The Court thus finds for defendants on plaintiffs' Establishment Clause claim.

An appropriate judgment will accompany this memorandum.

Dated this 2nd day of March, 1993.

Edward L. Fillipine
UNITED STATES
DISTRICT JUDGE

No. 4:92CV001813 ELF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE GOOD NEWS/GOOD SPORTS CLUB, JORDAN HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, PAT CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER, and L. CORBETT HEIMBURGER,

Plaintiffs,

v.

THE SCHOOL DISTRICT OF THE CITY OF LADUE, BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, and CHARLES MCKENNA, in their individual capacities,

Defendants.

JUDGMENT

In accordance with the memorandum filed this date and incorporated herein,

IT IS HEREBY ORDERED AND ADJUDGED that defendants shall have judgment against plaintiffs on Counts I and II of plaintiffs' complaint, each party to bear its own costs.

Dated this 2nd day of March, 1993.

Edward L. Filippine
UNITED STATES
DISTRICT JUDGE

APPENDIX D

SCHOOL DISTRICT OF THE CITY OF LADUE

Use of Premises Policy

The Board of Education supports the use of school facilities for activities other than the regular educational program when the use of premises by patrons shall not interfere with regular school operation. While the intent of this policy is to make facilities available to District residents, the Board retains the right to reject or accept any or all applications under equitable administration of this policy. The Board of Education shall at all times maintain full control of school property and cancellation of utilization may be ordered by the School District whenever desirable. (The provisions of the policy will be implemented by designated school staff - see below.)

I. Administrative Responsibility

A. The principals of each elementary and secondary school shall be responsible for scheduling other than school use of school.

B. The Director of Athletics is responsible for scheduling activities involving use of gymnasium and/or athletic fields.

II. Priority for Use of School Facilities

A. In all cases, School District sponsored activities shall have scheduling priority and the District may pre-empt use by outside groups at any time.

B. Following School District use, the order or priority shall be:

1. School Related Organizations
2. Community Groups (composed primarily of School District Residents - 75%

3. Other Community Groups (where less than 75% membership is from the Ladue School District. Such groups shall be assigned on the basis of available space and then only on a short-term basis.)

C. Requests for use of schools that involve a leasing agreement shall require School Board approval.

D. Use of facilities by for-profit organizations is not authorized under this policy.

III. Custodial Fee

Custodians are customarily on duty during the school year until 11:00 p.m. Monday through Friday. Use of the building other than at these times will require a fee of $10.00 per hour. If additional custodians are required, the fee will be adjusted accordingly.

IV. Supervision

Adult supervision is required at every activity. The group's appointed supervisor must be in attendance a all times to accept responsibility for the conductt

of the group and the care of the building and equipment.

V. General Usage Procedures

A. Permits for use of school facilities are processed through the individual school. Building permit requests should be made thirty days prior to the date of use. Every application for the use of school facilities shall state the general nature and purpose of the building usage.

B. Permits will not be granted for those days when school is closed during winter and spring vacation, nor during the first and last weeks of school or on school or other holidays.

C. The principal of the individual school or his designee will verify space availability and forward an application to the Superintendent's office. The Superintendent or his designee will compute applicable costs and forward a copy of a signed permit to the applicant, the school principal, and the maintenance office.

D. Permits will not be granted for any meeting which, in the judgment of the School District, may be in any way prejudicial to the best interests of the schools or the educational system, or for which satisfactory sponsorship or adequate adult supervision is not provided. Facilities shall be used strictly for purposes for which the space was designed.

E. The applicant shall notify the principal of the school of any cancellation of previously scheduled facilities at least twenty-four hours prior to the scheduled use. In case of failure to do so, the District may charge for expenses incurred in preparation for use of the facility requested.

F. Application for school facilities shall constitute acceptance by the applicant all the responsibilities stated and the willingness to comply with all rules and regulations regarding the use of school facilities as prescribed by the School District. The applicant must exercise the utmost care in the use of school premises and agree to protect, indemnify and save harmless the Ladue School District and its officers and employees from any and all claims, liabilities, damages, or rights of action, directly or indirectly, growing out of the use of the premises covered by the permit. In the event of damage to school property, the applicant shall accept the Superintendent of the Building and Grounds' estimate of the amount of damage and shall pay all appropriate repair and replacement costs.

G. Any loss, breakage, or need of repairs of facilities or equipment must be reported to the school principal immediately by the Supervisor in charge of the scheduled activity.

H. All payments are due upon receipt of invoice from the Superintendent's office.

I. Permits will be canceled the days school is not in session due to bad weather conditions.

VI. Specific Regulations

A. The custodian on duty is responsible for the maintenance operation of the physical plant.

B. Smoking is prohibited.

C. Gambling, drinking, or the possession of intoxicants or illegal chemicals within the school buildings, or on the school property, is prohibited.

D. Equipment of a specialized nature will be made available only with authorized personnel to supervise its operation.

E. The District shall assume no liability or responsibility for any equipment owned or leased by any permit holder which is used or stored on District property.

F. Use of kitchen facilities requires approval of the Cafeteria Director.

July 28, 1986

APPENDIX E

SCHOOL DISTRICT OF THE CITY OF LADUE

Use of Premises Policy
(July 1992)

As authorized in Section 177.031 RSmo, School District of the City of Ladue ("District") will permit non-school related use of the District's school buildings and grounds ("school facilities") by residents and non-residents of the District, including not-for-profit organizations (hereinafter collectively "Community Groups") for the free discussion of public questions or subjects of public interest, for meetings and for any other civic, social and educational purposes that will not interfere with the prime purpose to which the school facilities are devoted. Permission for such uses will be granted in accordance with the following rules and regulations:

I Community Groups will be permitted to use school facilities after 6:00 p.m. on school days (including summer school days) and after 8:00 a.m. on other days. No permits will be issued for days during the winter and spring school vacations, nor for other school holidays.

II Permission for use of school facilities after instructional time ends on school days will be granted to Community Groups: (1) for the use of District's athletic facilities, provided that the use is limited exclusively to athletic activities; and (2) for meetings of Scouts (Girl, Boy, Cub, Tiger Cub, and Brownies), provided that such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs.

III District will endeavor to grant permission for use on the date and at the time and place requested on the application. However, preference will be given to all school-sponsored and school-related activities. Also, District may cancel or terminate a permit at any time District decides that such action would be in its best interest.

IV Custodial fees may be charged if a custodian is required at a time when custodians are not scheduled for duty. Fees may also be charged for use of the kitchen facilities. Depending upon the

use requested, other fees may also be required. Applicant will be informed of all such fees at the time permission for use is granted.

V Applications for use of school facilities shall be made on the District's form and shall be filed at the office indicated on the form at least thirty days prior to the date requested for use. Application forms will be available at the Superintendent's and Principals' offices. Each application must designate an adult supervisor who will be in attendance at all times and will be responsible for the conduct of the group and the care of the school facilities used by the Community Group.

VI Acceptance of a permit to use school facilities shall constitute an agreement by the Community Group:

A. To report immediately to District any damage to school facilities (including equipment) which occurs during the Community Group's activity.

B. To pay the repair and replacement costs incurred by District as the result of such damage. District's statement of such costs

shall not be challenged by the Community Group.

C. To indemnify and hold harmless District, its officers and employees, from any and all claims, demands, damages and actions, directly or indirectly, arising out of or in any way related to the Community Group's use of school facilities.

D. To pay all fees charged by District for use of the school facilities.

E. To maintain good order and security during the Community Group's activity and to comply with all of District's rules and regulations regarding use of school facilities.

F. To notify District of a cancellation at least twenty-four hours prior to the scheduled use. Failure to notify may result in a charge by District for expenses incurred in preparation of the facility for the use requested.

G. To pay all fees and charges upon receipt of the District's invoice.

VII Additional rules and regulations regarding use of school facilities by Community Groups:

A. Smoking, gambling, drinking alcoholic beverages, and possession of intoxicants or illegal drugs and chemicals are strictly prohibited. Violation will result in immediate termination of the activity.

B. Equipment of a specialized nature will be made available only with authorized personnel to supervise its operation. The Community Group shall not provide any such equipment without written permission from District. District shall not be responsible or liable for any such equipment stored on District's property by the Community Group.

C. District personnel who are present in the school facility during a Community Group's activity may be authorized by the Superintendent or a principal to deal with any violation of this policy by the Community Group or with any other problem which may

occur during the Community Group's use of the school facility.

VIII School-sponsored and school-related activities will be scheduled by District administrative staff. Use of school facilities by governmental agencies such as the Board of Election Commissioners, will be scheduled by the Superintendent.

IX The administrative staff shall be responsible for implementation of this policy. The Superintendent shall promulgate such administrative rules and forms as are deemed necessary for implementation. The Superintendent is authorized to make final decisions on any questions which may arise regarding the interpretation and application of any of the provisions of this policy.

X This Use of Premises Policy has no relationship to and is separate and distinct from District's equal access policy, pertaining to student initiated club meetings at the high school pursuant to the Equal Access Act, 20 USC 4071-74.

Supreme Court, U.S.
FILED
FEB 21 1995

No. 94-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation, and BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, CHARLES McKENNA, ROBERT ADLER, NANCY ALBERT, LINDA SHER and JOLYNN WEINER,

Petitioners,

v.

THE GOOD NEWS/GOOD SPORTS CLUB, an unincorporated association, JORDAN HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER and L. CORBETT HEIMBURGER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

TIMOTHY BELZ*
Belz Jones & Hickel P.C.
7777 Bonhomme, Suite 1710
St. Louis, MO 63105
314/863-0200

CARL HOWARD ESBECK
John K. Hulston Hall
Room 213
Columbia, MO 65211
314/882-3035

*Counsel of Record

Counsel for Respondents

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QUESTIONS PRESENTED

1. Is the case moot because the School Board unilaterally amended its policy on the use of facilities by its resolution of November 14, 1994, closing the forum to all community groups?

2. In following *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), was the circuit court correct to conclude that there was viewpoint discrimination when: (i) the findings of fact by the district court indicated that the School Board adopted the use policy with the purpose of excluding the Club from the forum because of its religious perspective; and (ii) the use policy is facially discriminatory against religious speech?

3. Should the judgment be affirmed on one of the four alternative claims not taken up by the circuit court, whose judgment disposed of the appeal solely on the basis of viewpoint discrimination?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SCHOOL DISTRICT OF THE CITY OF LADUE, et al.,

Petitioners,

v.

THE GOOD NEWS/GOOD SPORTS CLUB, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OBJECTION TO JURISDICTION

On November 14, 1994, petitioners unilaterally amended the policy on the use of premises by closing the forum to all community groups. This eliminated the discriminatory treatment between Scouting groups and respondents' Club. This appeal is thereby moot.[1] *See infra* Reasons for Denying the Writ, Point I.

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[1]Counsel is under a continuing duty to inform this Court of any development which may have mooted an appeal. *Fusari v. Steimberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

STATEMENT OF THE CASE

The Policy On the Use of Premises that is the subject of this litigation was adopted by the petitioners ("School Board") on July 20, 1992 ("1992 Use Policy," referred to in the lower courts as "Amended Use Policy"). Its purpose was to exclude respondents ("Good News/Good Sports Club" or "Club") from school district facilities between 3:00 and 6:00 p.m. after the regular school day had ended while keeping the premises open during that time for Scouting and community athletic groups.

The 1992 Use Policy replaced a policy adopted in 1986. The first Club meeting under the 1986 Use Policy was held in December 1988, and monthly meetings continued without incident until the School Board's adoption of the 1992 Use Policy in July 1992. The Club's meetings occurred eight times per year (no summer meetings), and took place from approximately 3:05 p.m. to 3:55 p.m. at a junior-high building. Between 3:00 and 6:00 p.m., the forum was used approximately 300 times per year by Scouts and 700 times per year by athletic groups. The change in policies from 1986 to 1992 affected only the Club's eight meetings per year, leaving unaffected the approximately 1,000 uses by all others.

In its literature, the Club disclaimed any school sponsorship, and the Club required that its youth members obtain a signed parental consent form before attending. The Club is nondenominational and is open to all community youth.[2] The Club's program provided attendees with fun and constructive interaction with peers while building character from

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[2]Contrary to what is implied at Petitioners' Brief 38, to join the Club one does not have to be a student enrolled in the Ladue School District. Rather, membership is drawn from all community youth. For example, one of the plaintiffs, Dr. Larry Tychsen, is the parent of a parochial school student.

the perspective of religious values. For example, during 1991-92, the last year the Club met in school facilities, the theme was friendship. Specific meetings focused on choosing friends, how to be a friend, resisting pressure from friends to use drugs, being friends with the opposite sex, being friends with one's parents, and being friends with God.

Both the 1986 and 1992 Use Policies pertain to outside community groups, *i.e.*, organizations having no official status with the school district.[3] This case is not about use of facilities during regular school hours.[4]

The Club filed its complaint on September 11, 1992, alleging that the 1992 Use Policy violated various rights under the Free Speech Clause and the Religion Clauses.[5] There was an expedited discovery schedule followed by a three-day trial, November 16-18, 1992. The United States District Court for the Eastern District of Missouri entered its opinion

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[3]The 1992 Policy defines "community groups" as those engaging in "non-school related use of the District's school buildings and grounds . . . by residents and non-residents of the district, including not-for-profit organizations." Community organizations are contrasted with "school-sponsored and school-related activities." The Club is an unincorporated, voluntary organization which falls under the definition of community groups.

[4]Petitioners' contention that this case "extended" the law of *Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding equal access for school-recognized student organizations), to the elementary school level (Petitioners' Brief 17, 40-41) is incorrect. The contention distorts the Establishment Clause issues present here, which, as in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), concern community groups meeting during after-school hours.

[5]Contrary to the statement at Petitioners' Brief 8, a temporary restraining order was never requested. A motion for a preliminary injunction was requested, and it was later withdrawn in exchange for an early trial setting.

and judgment on March 2, 1993, upholding the constitutionality of the 1992 Use Policy.

The Club appealed raising several grounds for reversal. In an opinion handed down July 12, 1994,[6] the United States Court of Appeals for the Eighth Circuit reversed. Based on findings of fact that the School Board had adopted the 1992 Use Policy because of the Club's religious perspective,[7] and that the 1992 Use Policy on its face singled out religious speech for unfavorable treatment,[8] the circuit court concluded that the 1992 Use Policy had been adopted with the purpose of discriminating against the Club's viewpoint. For its principles of law, the circuit court followed *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S.Ct. 2141 (1993).[9]

6*Good News/Good Sports Club v. School Dist. of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

728 F.3d at 1507 ("The relevant inquiry was whether the [plaintiffs'] group was excluded **because of** its religious viewpoint, irrespective of whether the school district opposed that viewpoint.") (emphasis added).

828 F.3d at 1507 ("viewpoint discrimination appears on the face of the Amended Use Policy"); *id.* at 1507 n.12 ("The Amended Use Policy excludes only one viewpoint expressly: the religious viewpoint."); *compare id.* at 1509 ("Club's meetings comprised 8 of 993 total uses," yet only these eight uses were gerrymandered out of the forum by the 1992 Use Policy).

9Petitioners claim that in *Lamb's Chapel* this Court carefully limited its holding to the facts (Petitioners' Brief 38). They quote *Lamb's Chapel* as follows:

> The showing of the film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members.

113 S. Ct. at 2178. Without conceding talismanic significance to these particular facts for free-speech purposes, the quoted passage supports the Club rather than petitioners. Like the chapel, the Club does not meet during school hours, the Club is not sponsored by the school, and Club meetings are open to the community.

Because the circuit court reversed the trial court on the basis of viewpoint discrimination, it did not take up the Club's other arguments raised as alternative bases for reversal.[10]

The School Board filed a petition for rehearing and suggestion in support of rehearing *en banc*. Both were denied on September 29, 1994.

The School Board then filed a motion for stay of the mandate while it prepared the petition for a writ of certiorari. The Club opposed the stay because the school district

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[10]These additional arguments, expressly noted but not decided by the circuit court, are:

1. In adopting the 1992 Use Policy, the School Board purposely targeted the Club for unfavorable treatment in violation of the Free Exercise Clause. 28 F.3d at 1503 n.3; *see Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (setting forth Free Exercise Clause standard for reviewing a policy whose object is adverse treatment of a religious group).

2. The 1992 Use Policy created a limited public forum for after-school meetings by youth opportunity organizations, thus content-based discrimination as to similar groups excluded from the forum can be justified only by a compelling governmental interest. 28 F.3d at 1505 n.6.

3. Even a content-neutral policy in a nonpublic forum must be reasonable. The policy unreasonably excludes religious youth groups. 28 F.3d at 1505 n.6. Because government must be neutral as to religion, it is not reasonable to single out private religious speech for detrimental treatment. *See Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226, 248 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

4. The 1992 Use Policy increases the entanglement between church and state; and the no-religion *proviso* clause in the Policy, when not enforced, results in the school preferring one religious viewpoint over another. 28 F.3d at 1510 n.19.

These additional four questions will have to be taken up should the petition for a writ of certiorari be granted.

would suffer no harm should the Club begin to hold its monthly meeting during non-school hours as it had from December 1988 to June 1992. The stay was denied on October 26, 1994. However, the circuit court directed that the mandate be delayed for ten days so that the School Board could seek a stay from the United States Supreme Court. The School Board never availed itself of the opportunity to seek a stay from this Court.

The circuit court's mandate was handed down on November 10, 1994. The mandate incorporated by reference the opinion of July 12, 1994, which states that "we reverse the judgment of the district court and remand to the district court **for a determination of a remedy consistent with this opinion**." 28 F.3d at 1511 (emphasis added).

Having been notified by the clerk that the mandate had come down, the School Board did not wait for "the district court [to] determin[e] a remedy consistent with [the circuit court's] opinion." Rather, on the heels of the November 10th mandate and without notifying the Club or the district court, on November 14, 1994, the School Board convened in closed session. At that meeting, the School Board unilaterally adopted a resolution amending the 1992 Use Policy. The November 14th action states, "the Use of Premises Policy adopted July 20, 1992, [is] **amended** in this Resolution" (Appendix I-2, attached hereto; emphasis added). By that amendment, the School Board closed the 3:00 to 6:00 p.m. after-school forum to all community groups.

The district court and the Club were notified of the November 14, 1994, action by legal counsels' letter to the district court dated November 17, 1994 (Appendix II, attached hereto). In the letter, the School Board's counsel twice admits that the 1992 "use of premises policy was **changed**" by the action of November 14th (Appendix II-1; emphasis added).

The mandate is still before the district court. However, following the issuance of a consent order of December 6, 1994, referencing petitioners' intent to file a petition for a writ, there has been no action on the mandate.

SUMMARY OF THE ARGUMENT

POINT I: While this appeal was pending, the case became moot through the unilateral action of petitioners. On November 14, 1994, the School Board amended the Use of Premises Policy adopted July 15, 1992, pertaining to community groups. The 1992 Use Policy has been the sole subject of this lawsuit. The November 14th action closed altogether the forum which had permitted community Scouting organizations and community athletic teams to use school facilities between 3:00 and 6:00 p.m. Accordingly, the forum to which the Club sought access on a nondiscriminatory basis is no longer open to any community organization.

POINT II: The circuit court's opinion is based on: (i) the findings of fact by the district court indicating that the School Board adopted the use policy with the purpose of excluding the Club from the forum because of the group's religious character; and (ii) the 1992 Use Policy's facial discrimination against religious speech. Accordingly, the decision below turned on findings specific to the circumstances of this case, not novel questions of law. The applicable principles of law are stated in this Court's unanimous decision in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993), and were followed below.

REASONS FOR DENYING THE WRIT

I. The Case Has Become Moot On Appeal.

The complaint of September 11, 1992, sought no damages, only prospective injunctive relief from the terms of the 1992 Use Policy. In its opinion of July 12, 1994, the circuit court's analysis was that the Club was entitled to a remedy because petitioners allowed Scouting programs to use facili-

ties during after-school hours. 28 F.3d at 1505-06. As a result of the November 14, 1994, amendment to the 1992 Use Policy, petitioners' discrimination against the Club *vis-á-vis* the Scouting groups no longer exists. By eliminating the forum altogether, the legal relationship between the disputing parties has been materially altered. Legislation amending the law under challenge normally renders a case moot.[11]

A. The November 14, 1994, Amendment Was Voluntary.

In its recitals, the November 14, 1994, amendment claims to "acknowledge and accommodate the Eighth Circuit Court's decision." Consequently, petitioners may argue that the November 14, 1994, action was involuntary, *i.e.*, that the School Board was only anticipating the injunction of the district court that inevitably would be forthcoming pursuant to the mandate. The School Board might argue it was merely conforming to the circuit court's opinion even before being ordered to do so by the district court.

Any such argument would be without merit. Petitioners' motion to stay the mandate had just been denied. The School Board thus found itself in a situation where there was

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[11]This is not a case where mootness justifies vacatur of the judgment under review. Vacatur never applies when the party who would benefit by vacatur caused the mootness by its own actions. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994); *Karcher v. May*, 484 U.S. 72, 82-83 (1987). Any pending matters of costs and attorney fees under Rule 54(d), Fed. R. Civ. P., will not keep an appeal from being denied which is otherwise moot on the merits. *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (costs); *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (costs); *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980) (attorney fees); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (attorney fees); *ISKCON v. Andersen*, 569 F.2d 1027, 1028-29 (8th Cir. 1978) (attorney fees). Because costs and fees are ancillary to the merits, such awards were not intended by Congress to alter this Court's Article III jurisdiction.

only one way in which it could both: (i) comply with the circuit court's opinion of July 12, 1994; and (ii) otherwise keep intact the 1992 Use Policy. That way was to readmit the Club, pending the appeal, to the 3:00 to 6:00 p.m. after-school forum.

The School Board did not choose that simple, straightforward path, an approach that would have had the added benefit of not dislocating scores of other community groups.[12] Instead, the School Board closed the forum, thereby ousting the Scouting and athletic groups from their previously scheduled uses between 3:00 and 6:00 p.m. But this latter path necessarily meant that the Board had to amend the 1992 Use Policy. This choice was entirely voluntarily, not one forced upon the School Board by either the circuit court's mandate or the surrounding circumstances.[13] Thus, petitioners chose a path that mooted their appeal.

12The simple means of compliance with the mandate was to let the Club start meeting in the 3:00 to 6:00 p.m. forum (eight meetings per year), not to dislocate hundreds of people by ousting the Scouting programs (approximately 300 meetings per year) and the athletic teams (approximately 700 uses per year). Readmitting the Club was also the easy path. The Club had been meeting at a school building without incident for academic years 1988-89, 1989-90, 1990-91 and 1991-92. Instead, the School Board went out of its way to deny access to the Club, even if it meant amending the 1992 Use Policy and dislocating many other organizations.

13Implicit in the November 14, 1994, resolution is an admission of its voluntariness. A self-serving recital states that "the Board of Education has been advised by legal counsel that the school district has the right to close [the] non-public forum at this time" (Appendix I-2). The assertion is that petitioners have a legal **right** to close the forum, not that there is a legal **duty** to do so.

The adoption of the November 14, 1994, resolution was voluntary for the additional reason that the district court had not yet acted on the mandate. Indeed, there had been no time for the trial court to act. If the School

(footnote continued on following page)

B. No Exception To The Rule Of Mootness Is Applicable.

As a general rule, a discretionary appeal which has become moot while pending must be denied. There is an exception to this rule—not applicable here—when the government has voluntarily ceased from alleged illegal conduct with the design to deprive the appellate court of jurisdiction, leaving the government free to revert to its old ways once the court relinquishes jurisdiction. *See DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (*per curiam*). The rationale is that if local governments, when sued, are permitted to moot a case by unilateral cessation of their conduct, then government attorneys could manipulate when and before which court to defend on the merits.[14]

The voluntary-cessation exception is applicable to situations which are the reverse of this case, *i.e.*, if the School Board had won in the circuit court and then sought to preserve its victory by attempting to moot the Club's appeal.[15]

(footnote continued from previous page)

Board had waited for the district court to act on the mandate, it risked entry of an injunction that ordered the Club readmitted to the forum. Thus, the School Board moved quickly to close the forum before the district court had time to take up the matter.

14 *See United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.").

15 *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897):

> If the mere dissolution of the association worked an abatement of the [anti-trust] suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court

(footnote continued on following page)

In the instant case, it is not the government's attorneys who are trying to prevent the Court from taking jurisdiction by amending the Policy. Rather, it is the Club which is pointing out that the appeal is moot as a result of the School Board's abandoning the 1992 Use Policy. Accordingly, there is no need for concern that a party has taken action unilaterally so as to manipulate the general rule on mootness.

The voluntary-cessation exception is inapplicable for the additional reason that the School Board is not free to "revert to its old ways." If petitioners were to readopt the 1992 Use Policy, they would be defying the circuit court's opinion. The mandate is still in the hands of the district court and can be enforced. Thus, petitioners simply cannot "revert to their old ways" without disobeying the decision below as embodied in the mandate.

C. Any Attempted Reservation Of The Right To Appellate Review Is Ineffective.

Any attempt by the School Board to avoid mootness by characterizing their November 14, 1994, amendment as temporary "pending final resolution of this lawsuit" (*see* Petitioners' Brief 8 n.5) will be to no avail.

Any attempted "reservation of a right" to appellate review of the 1992 Use Policy, while at the same time aban-

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> below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. . . . [A] trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit.

Id. at 309.

doning that policy, cannot keep the "case or controversy" alive. That would be duplicitous: changing the 1992 Use Policy, so the Club cannot meet, while still obtaining judicial review of a policy no longer in force. Similar artifices have been rejected. *See SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972) (Dow Chemical's one-time concession to publish disputed proxy statement, made "without prejudice to future exclusion" of said proxy, was not sufficient to prevent mootness on appeal), and *United States v. Hamburg-American Co.*, 239 U.S. 466 (1916):

> "[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

Id. at 475-76 (quoting from *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 314 (1893) (in action for unpaid taxes, deposit of allegedly owed taxes to the credit of the state, plus interest and costs, moots taxpayer's appeal)).

At this moment in time, the November 14, 1994, amendment is on the books until the School Board changes it, which by the terms of the resolution it is not required to do. It is wholly speculative what the School Board will do in the future, if anything. The resolution states that the School Board will have a meeting to decide what its next move will be when this case is finally disposed of, using these words:

> WHEREAS, the Board of Education will review and reconsider the use of Premises Policy adopted July 20,

> 1992, as amended in this Resolution immediately following the final disposition of the lawsuit . . . .

Appendix I-2. Constitutional questions that may arise in the future based on speculation as to what the School Board may do are not ripe for review. Courts do not render advisory opinions.

* * * * *

The School Board's intentions on November 14, 1994, were plain. The School Board's unilateral action was born of a desire to have it both ways, *i.e.*, prosecute its appeal while keeping the Club out of the after-school forum.

A stay of the mandate had just been denied. Petitioners were faced with having to readmit the Club to the forum. Theretofore they had fought zealously to keep the Club's religious views out of the forum. So they decided to preempt the judicial process and change the "rules of the game" by ousting some 300 Scout meetings and 700 athletic uses, rather than be ordered by the district court to readmit the Club. Instead of simply complying with the mandate, the School Board did away with the 1992 Use Policy which was the basis for this "case or controversy," and thereby mooted their appeal. Having created this most peculiar situation, petitioners must be required to live with it.[16] The petition for a writ of certiorari should be denied.

16The resolution of November 14, 1994, may constitute a new violation of the Club's legal rights. However, the scope of the complaint in this action, filed as it was in September 1992, obviously did not anticipate claims arising over two years later.

II. The Decision Below Turns On Findings Of Fact Not Challenged Here, And There Is No Conflict With Prior Decisions Of This Court.

This is a matter that turns on findings of fact unique to this case, not one presenting novel questions of law. The circuit court's decision is a straightforward application of this Court's unanimous decision in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993).[17]

A. The Controlling Law Is Found In *Lamb's Chapel*, And Its Principles Were Followed Below.

In *Lamb's Chapel*, because the school district had opened its property to various community uses during non-school hours, the chapel argued that the property had become a limited public forum. 113 S. Ct. at 2145. Rather than decide the broader question of whether the school had created a limited public forum, the Court ruled that even within the parameters of the uses officials did allow, the school had

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[17]Similar cases concerning the unlawfulness of constricting a public forum to prevent access by a particular group are found in *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 706-07 (4th Cir.), *cert. denied*, 114 S. Ct. 2166 (1994) (facially discriminatory policy assessing churches higher rent to use school premises); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164-65 (6th Cir. 1993) (facially neutral policy on private displays in public park held unconstitutional as city had discriminatory purpose adverse to Lubavitch); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1372-79 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (striking down amended school use policy that was adopted by school to gerrymander out religious organization). *See also, Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993) (concerning amended policy on literature distribution at school, parts of policy were neutral and other parts unconstitutional because discriminatory); *Christian Science Reading Room Jointly Maintained v. City & County of San Francisco*, 784 F.2d 1010, *amended*, 792 F.2d 124 (9th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (municipal airport's amended rental policy excluding religious tenants for reasons of remedying a perceived establishment-clause violation lacks rational basis).

violated the Free Speech Clause by engaging in viewpoint discrimination. *Id.* at 2147.

Similarly, the Eighth Circuit decided this case on the assumption, *arguendo*, that the 1992 Use Policy had not established a limited public forum but a nonpublic forum. 28 F.3d at 1505 n.6. And like the school in *Lamb's Chapel*, the School Board here was found to have adopted a Use Policy with the purpose of excluding the Club because of its religious point of view.

There are three issues that go to the heart of the School Board's petition. First, what does it mean to be "viewpoint neutral"? Second, do the findings below show that the subject matter of character and moral development in youth was a topic already allowed into the forum? And third, do the findings below show that petitioners had a discriminatory purpose?

1. In Defining "Viewpoint Neutrality," Religious Perspectives On A Given Topic Do Not Constitute A Separately Excludible Category Of Speech.

In *Lamb's Chapel*, the school's policy on the use of its facilities by community organizations excluded religious uses. The courts below, the Supreme Court reasoned, had been confused by what it meant for an access policy to be viewpoint neutral. 113 S. Ct. at 2147. The lower courts had held that the policy was viewpoint neutral because it did not discriminate among religions. Rather, all religious uses were treated the same: they were excluded. But the Supreme Court said that even if the use policy was evenhanded in its exclusion of religion, that was not responsive to the requirement of viewpoint neutrality:

> That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer

> the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

Id.

Just like the lower courts in *Lamb's Chapel*, petitioners harbor too narrow a conception of what it means to be neutral. As noted by the circuit court:

> [T]he *Lamb's Chapel* Court refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of *seemingly* secular subject matter.

28 F.3d at 1506-07 (emphasis in original; citing *Lamb's Chapel*, 113 S. Ct. at 2147). *See also*, 28 F.3d at 1506 n.8 (rejecting petitioners' argument "that the subject matter of the Club's speech is not already included in the forum because religious speech is a separate speech category," citing *Lamb's Chapel*, 113 S. Ct. at 2147).

2. The Topic Was Already Allowed Into The Forum.

In *Lamb's Chapel*, a topic that could be discussed in the forum was child development and family values. 113 S. Ct. at 2147. In the instant case, the topic allowed in the forum was moral and character development of youth. 28 F.3d at 1506. This determination was based on the findings of fact by the district court:

> When the district court analyzed whether the Scouts and Club were similarly situated, it determined that

> *. . . both the Club and the Scouting program are concerned with the moral development of youth . . . .*
>
> Dist. Ct. Op. at 21 . . . The district court also found that "[t]he purpose of Scout meetings is for the young persons involved to have fun, *to support the ideals of Scouting*, education, and *reinforcement of moral values.*" *Id.* at 20 . . .

Id. at 1505 (emphasis in original; quoting district court).

> [T]he "ideals of Scouting," which Scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development.
>
> Further, the Amended Use Policy defines the scope of permissible speech from 3 to 6 p.m. by reference to the speech which may occur during the Scout meetings. The Scouts may engage, with the School District's blessing, in any speech relating to moral character and youth development. [citation to trial exhibit and *Lamb's Chapel* omitted] Because both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy.

Id. at 1506.

> Like the Club, the Scouts use their meetings as a forum for the purpose of developing moral and character development through skits, songs, and activities. The only difference is that the Club employs a religious perspective.

Id. at 1506 n.7.

Unless petitioners are prepared to argue that these findings are clearly erroneous (*see* Fed. R. Civ. P. 52(a)), it is an

established fact in this case that a subject matter already allowed into the forum was moral and character development of youth. The programs of both the Club and the several Scouting organizations addressed that topic.

3. The School Board Had A Discriminatory Purpose: It Was Found To Have Adopted The Use Policy "Because Of" The Club's Religious Perspective.

In an action for viewpoint discrimination, discriminatory purpose[18] is an element of the claim. What is not required—and where Petitioners' Brief 20-32 is therefore mistaken—is proof of invidious animus or hostility by the School Board toward the Club or its religious perspective.[19]

Petitioners refer to the circuit court's opinion (Petitioners' Brief 14), but they stop quoting too soon. The balance of the quoted passage demonstrates that the circuit court correctly read *Lamb's Chapel* as applying a test that examined whether

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[18]As this Court held in the context of the Equal Protection Clause:

> "Discriminatory purpose," . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979). *See also, id.* at 279 nn.24 & 25.

[19]Petitioners claim that the circuit court adopted an "effects" test (Petitioners' Brief 14) and later a "causation" test (Petitioners' Brief 30). Both claims are incorrect. The circuit court used the "because of," not merely in spite of test, and it refused to require proof of hostility, opposition, or other invidious animus such as the School Board being "out to destroy the Club." 28 F.3d at 1507 and n.10.

the School Board adopted the Use Policy "because of," not merely in spite of, the Club's religious views:

> In *Lamb's Chapel*, the Supreme Court determined that the school access policy constituted impermissible viewpoint discrimination without any determination that the school officials opposed or disagreed with the religious perspective proposed. *See* 113 S. Ct. at 2147-48. **The relevant inquiry was whether the Lamb's Chapel group was excluded because of its religious viewpoint**, irrespective of whether the school district opposed that viewpoint.

28 F.3d at 1507 (emphasis added).[20]

The circuit court found that petitioners had the requisite discriminatory purpose ("because of," not merely in spite of, the Club's religious perspective). It relied upon: (i) the findings of fact by the trial court; and (ii) the Use Policy's facial discrimination against religious views in the forum.

---

[20]This test of the government's discriminatory purpose ("because of," not merely in spite of), is the same test used under the Free Exercise Clause to remedy hidden but nonetheless real discrimination on the basis of religion or a religious practice:

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . , and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2227 (1993). It makes sense to use the same test of discriminatory purpose for both viewpoint discrimination and the Free Exercise Clause. Respondents raised a free-exercise claim on appeal, but the circuit court did not rule on that basis.

First, relying on findings by the district court, the circuit court noted:

> "[T]he citizen comments and complaints about the Club were the primary factor leading to the School Board's *examination* of the 1986 Use Policy *and eventual adoption* of the Amended Use Policy."

Id. (emphasis in original; quoting district court).

> The only complaints registered against the Club were in reference to the religious content of the Club's meetings.

Id.

> "[The Club] presented evidence, as did *[the School District]*, that criticism from some members of the community about the religious nature of the Club was the catalyst for amending the Policy."

Id. (emphasis in original; quoting district court). Note that the district court found here the reasons for **amending** the policy, not just **reexamining** it.

Summarizing the necessary implication from the foregoing findings of the district court, the circuit court concluded:

> We cannot say that the district court's finding that the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from its premises from 3 to 6 p.m. on school days was clearly erroneous.

Id.

Second, the circuit court noted that the 1992 Use Policy was facially discriminatory against religious speech.[21] The

---

[21]Even if the 1992 Use Policy had been facially neutral as to religious expression, that alone would not have ended the inquiry as to discrimina-

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1992 Use Policy did not attempt to disguise its purpose of discriminating against the religious point of view. The Policy allowed various Scouting groups into the after-school forum:

> provided that such meetings shall be limited exclusively to the scout program and not include any speech or activity involving religion or religious beliefs.

The no-religion *proviso* is a window into the collective aim of the School Board as a body determined to keep religious speech out of the forum. Scouts could approach their youth programs from a myriad of perspectives save one: a religious point of view.[22] It is hard to imagine more damning evidence of the School Board's discriminatory purpose.

* * * * *

Petitioners' argument that invidious animus is required in a claim of viewpoint discrimination is contrary to *Lamb's Chapel*. There was no evidence in *Lamb's Chapel* that the school held ill will toward the chapel, or that the school directly opposed or disagreed with the view of family life in the film series that the chapel sought to exhibit. This is because the definition of viewpoint "is not limited to whether a speaker supports or opposes a particular resolution of an issue; rather, viewpoint is synonymous with per-

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tory purpose. The federal government's policy in *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985), was viewpoint neutral on its face. Nonetheless, this Court remanded for additional findings on whether the government's actions were viewpoint discriminatory. *Id.* at 812-13.

22From the very text of the 1992 Use Policy, the circuit court found it evident that "[t]he Amended Use Policy excluded only one viewpoint expressly: the religious viewpoint. . . . Like *Lamb's Chapel*, the only perspective expressly excluded is the religious perspective." 28 F.3d at 1507 n.12.

spective." 28 F.3d at 1506 (citing *Lamb's Chapel*, 113 S. Ct. at 2147 (film series was excluded because the "presentation would have been from a religious perspective," not because school opposed Dr. James Dobson films)).[23]

Discriminatory purpose ("because of," not merely in spite of, the Club's religious perspective) does not imply invidious animus or censorial motive. This Court has repeatedly held that a "guilty mind" is not required in cases claiming discrimination against protected speech. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), summarizes the case law:

> True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster v. Members of New State Crime Victims Bd.*, 112 S. Ct. at 509. Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers."

113 S. Ct. at 1516.[24]

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[23]Petitioners sought below to increase respondents' burden of proof by arguing that the Club failed to prove that the School Board "sought to destroy the Club." The circuit court rejected the argument as the false requirement that it was: "The Club never argued that the School District acted to destroy the Club . . . ; thus, far from abandoning this claim . . . the Club never raised it." 28 F.2d at 1507 n.10.

[24]*See also, Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991) (one challenging discriminatory speech restrictions "need adduce no evidence of an improper censorial motive"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("no evidence of an

(footnote continued on following page)

Evidence of vigorous opposition to a given message, or heated disagreement with the aims of a particular speaker, would, of course, be more than sufficient to satisfy the element of discriminatory purpose. But what is sufficient under the law is not the same as what is minimally required by the law. *Cornelius* and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), do not hold that viewpoint discrimination requires proof of a malevolent intent to suppress the Club's views. Such a result would be at odds with this Court's line of cases culminating with *Lamb's Chapel*.

B. Because The Club's Program Is PRIVATE Speech—As Distinct From GOVERNMENT Speech—The Establishment Clause Cannot Justify The School Board's Discrimination Against Religious Views.

Respondents' expression is private religious speech. The Establishment Clause addresses only religious speech by government. As stated in *Westside Community Schools Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion,

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improper censorial motive" is required); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*, 460 U.S. 575, 592 (1983) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment"; "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

> which the Free Speech and Free Exercise Clauses protect.

Id. at 250 (emphasis in original).[25] The First Amendment, like the entire Bill of Rights, is a check upon government, not upon private citizens.[26]

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[25]*See also, Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (noting that the Establishment Clause applies only to "speech, undertaken or approved by the State"); *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (stressing that "[a] school official, the principal, decided that an invocation and a benediction should be given" and noted that "this is a choice attributable to the State"); *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) ("The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. . . . The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools.").

[26]Moreover, this case is about private speech outside of normal school hours. It is not about speech during instructional time when there is an issue of control as to matters of curriculum (*see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)), or about student conduct during an official school event (*see Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)). But a public school's control over instruction and learning environment is not the issue here any more than it was the issue in *Widmar* and *Lamb's Chapel*.

Numerous lower courts have held that equal access is required for outside community groups requesting to meet during after-school hours. *See Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) (school ordered to permit use of facility by religious group to have entertainer perform and discuss his faith); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist.*, 941 F.2d 45 (1st Cir. 1991) (requiring that community religious organization be afforded use of school facilities); *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 694 (2d Cir. 1991) (school auditorium ordered to be made available to religious organization for worship and distribution of literature); *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676 (2d Cir. 1988) (school authorities' actions unlawful when denying to church the renewal of a permit to use school building during noninstructional hours); *Shumway v. Albany County Sch. Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993) (holding that a public school violated the Free Speech Clause when it refused use of school facilities to hold a parent-sponsored baccalaureate ceremony); *Youth*

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But petitioners still feign worry that those among the public who learn that the Club is using facilities during non-school hours might not appreciate the distinction between private speech and government speech, and the public might mistakenly believe the Club's expression is endorsed by the School Board. This argument has rightly been dubbed the "ignoramus's veto." *See Americans United v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (privately funded menorah display in public forum does not violate First Amendment). As this Court said in *Mergens*, 496 U.S. at 250, it is not too much to expect of the public to understand that schools do not endorse everything they fail to censor. The circuit court rejected petitioners' contrived worry that they might be seen as endorsing religion by quoting with approval *Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295, 1300 ("If pupils do not comprehend so simple a lesson [as the difference between public and private speech], then one wonders whether the Wauconda schools

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Opportunities Unlimited, Inc. v. Board of Pub. Educ. of the Sch. Dist. of Pittsburgh, 769 F. Supp. 1346 (W.D. Pa. 1991) (summer religious program for youth granted access to school facilities); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991) (equal access ordered for nondenominational religious group to hold private, voluntary baccalaureate service in school auditorium); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (church must receive equal access to school auditorium to conduct private baccalaureate service as a matter of free exercise of religion); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (school district required to offer its buildings to church for worship services on same basis as nonreligious groups); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (students wishing to pray and read scriptures before school day begins and within five minutes after end of instructional day have First Amendment right to do so); *Resnick v. East Brunswick Tp. Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978) (school district required as a matter of free exercise to allow facilities to be used by religious groups on same basis as secular groups).

can teach anything at all."). *See also, Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) ("If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum.").[27]

The evidence is uncontradicted that the Club did all it could to separate itself from the school district in the public's mind. *See* 28 F.3d at 1509 n.17. In its literature, the Club disclaimed any school sponsorship, and it required its youth members to obtain a signed parental consent form before attending. There was no evidence that anyone

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[27]Petitioners' Brief 39 cites the district court opinion in *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992), but it is easily distinguished. Petitioners fail to give the citation to the full opinion of the Sixth Circuit. *See* 1992 WL 329536 (*per curiam*). The district court in *Quappe* expressly said that had it not been for the activities of an elementary classroom teacher, Mrs. Penwell, who founded the club and participated in its activities, the holding might differ. During the school day, Mrs. Penwell actively recruited students to attend the club, and had led prayers, distributed Bibles, and displayed religious posters on classroom walls. At the club meetings, she greeted the children at the start of the meeting, took attendance, and distributed study materials. 772 F. Supp. at 1006-07. Mrs. Penwell surely crossed the line from private speech to government-endorsed speech. Nevertheless, the district court limited its holding to the facts:

> [I]t is clear that determination of establishment clause cases is a fact-specific inquiry which may be altered by any of a myriad of factual permutations. . . . Were it not for the behavior of Mrs. Penwell, it is not certain that the [school officials] could have justified their content-based decision since the danger of impermissible state endorsement would have been greatly reduced. Should the dangers presented by Mrs. Penwell's activities abate at some future date, the risk of an appearance of state endorsement may correspondingly diminish. The Club should not be prevented in perpetuity from meeting [after school] in the absence of a showing that the interests asserted today will be unchanged tomorrow.

Id. at 1015-16. The Sixth Circuit affirmed in a one-page *per curiam* opinion, noting that the particular activities of Mrs. Penwell were crucial to the determination by the trial court.

thought the Club was an official function of the school.[28] Rather, the findings below indicate that some complaining parents knew full well that the religious Club was private. These parents wanted the School Board to oust the Club precisely because, in their opinion, religion is best kept private and thus does not belong in public buildings.

28In an effort which is at best obfuscatory, petitioners raise the matter of a former member of the School Board, Jane Cunningham, once being a leader of the Club. Petitioners' Brief 3, 4, 17 n.10. What they neglect to tell this Court is that the evidence was uncontested that Mrs. Cunningham was not involved with the Club after June 1991 and that she went off the Board in April 1992. This lawsuit is about the petitioners' adoption of the Use Policy on July 20, 1992, long after Mrs. Cunningham had stopped working with the Club as well as left her office on the Board. Neither the district court nor the circuit court found any link between Mrs. Cunningham and the Board's "need" to adopt the Policy.

The school district provided a "late bus" departing at 4:00 p.m. for students who had stayed after school. Contrary to the statement at Petitioners' Brief 4, the evidence was uncontradicted that students did not have to be involved in a school-sponsored activity to ride the late bus. Some of the youth attending Club meetings rode the late bus.

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted this 17th day of February, 1995.

TIMOTHY BELZ*
Belz Jones & Hickel P.C.
7777 Bonhomme, Suite 1710
St. Louis, MO 63105
314/863-0200

CARL HOWARD ESBECK
John K. Hulston Hall
Room 213
Columbia, MO 65211
314/882-3035

**Counsel of Record*

Counsel for Respondents

Of Counsel:
ALEXIS I. CROW
The Rutherford Institute
Post Office Box 7482
Charlottesville, Virginia 22906
804/978-3888

APPENDIX I

RESOLUTION

WHEREAS, the Eighth Circuit Court of Appeals in a majority panel opinion has held that Ladue School District's Use of Premises Policy, adopted July 20, 1992, "violates the free speech clause of the First Amendment because it results in impermissible viewpoint discrimination"; and,

WHEREAS the School District will petition the Supreme Court of the United States to review the decision of the Eighth Circuit Court of Appeals; and,

WHEREAS the School District's request for a stay of the Eighth Circuit Court's mandate has been denied and, consequently, the School District must acknowledge and accommodate the Eighth Circuit Court's decision in the Good News/Good Sports Club lawsuit pending final disposition of that case; and,

WHEREAS in order to remove, pending final disposition of the lawsuit, the constitutional deficiency in the Use of Premises Policy as found by the Eighth Circuit Court of Appeals, to protect and promote the interest of students who remain at school after instructional time ends for school related activities, and to avoid public controversies regarding the use of school facilities by community groups during that time, the Ladue Board of Education has determined to close the non-public forum from 3:00 p.m. to 6:00 p.m. on school days which is now provided for scout programs and athletic groups in the Use of Premises Policy adopted July 20, 1992; and,

WHEREAS, the Board of Education has been advised by legal counsel that the school district has the right to close that non-public forum at this time; and,

WHEREAS, the Board of Education will review and reconsider the Use of Premises Policy adopted July 20, 1992, as amended in this Resolution immediately following the final disposition of the lawsuit "Good News/ Good Sports Club vs. School District of the City of Ladue."

NOW THEREFORE BE IT RESOLVED THAT pending final disposition of that lawsuit and subject to further orders of court, Ladue school facilities will not be available for use on school days by any community group, including scouts and athletic groups, until after 6:00 p.m. and that after that time on school days and all day on weekends and holidays religious, political, philosophical, civic and other community groups, including scouts and athletic groups, may have access to Ladue school facilities in accordance with the terms and conditions of the Use of Premises Policy adopted July 20, 1992, as amended by this Resolution; and,

BE IT FURTHER RESOLVED THAT all permits previously issued to scout and athletic groups for use of Ladue school facilities during the 3:00 p.m. to 6:00 p.m. period on school days subsequent to the date of this resolution are hereby canceled and revoked and the administration shall notify forthwith all such groups of the cancellation of their respective permits.

November 14, 1994

APPENDIX II

KOHN, SHANDS, ELBERT, GIANOULAKIS & GILJUM
ATTORNEYS AT LAW
ONE MERCANTILE CENTER, 24TH FLOOR
ST. LOUIS, MISSOURI 63101

November 17, 1994

The Honorable Edward L. Filippine
Judge
United States District Court for the
Eastern District of Missouri
United States Court and Custom House
Tucker Boulevard and Market Street
St. Louis, Missouri 63101

Re: *Good News Good Sports Club v. School District of the City of Ladue, et al., No.___*

Dear Judge Filippine:

On November 9, 1994, the United States Court of Appeals for the Eighth Circuit issued its mandate based on the court's majority panel opinion holding Ladue's use of premises policy unconstitutional. The Ladue Board of Education decided that pending disposition of its petition for writ of certiorari which defendants will file in the United States Supreme Court on or before December 28, 1994, its policy should be changed to eliminate the policy's constitutional deficiency found by the majority panel opinion.

Accordingly, at a meeting of the Ladue School Board on Monday, November 14, 1994, the use of premises policy was changed by closing school facilities to all community groups, including scouts and athletic groups, prior to 6:00 p.m. on school days. The limited public

forum for all religious, political, philosophical, civic and other community groups remains open after 6:00 p.m. on weekdays and all day on weekends and holidays. A copy of the Board's Resolution of November 14, 1994 is enclosed.

Very truly yours,

/s/ Robert McClintock
Robert McClintock by JG

/s/ John Gianoulakis
John Gianoulakis

cc: Mr. Carl Esbeck
Mr. Tim Belz

No. 94-1299

FILED
MAR - 6 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE SCHOOL DISTRICT OF THE CITY OF LADUE, a public corporation, and BARBARA SACKS, CHARLES H. COBAUGH, JOYCE FOLLMAN, ROBERT MINKLER, ANN BOON, CHARLES MCKENNA, ROBERT ADLER, NANCY ALBERT, LINDA SHER and JOLYNN WEINER,

Petitioners,

—v.—

THE GOOD NEWS/GOOD SPORTS CLUB, an unincorporated assocation, JORDON HEIMBURGER, a minor, by his Next Friend, L. Corbett Heimburger, CHRISTOPHER HIRT, a minor, by his Next Friend, Peggy Hirt, DAVID HIRT, a minor, by his Next Friend, Peggy Hirt, COMFORT IBE, a minor, by her Next Friend, Afocha Ngozi Ibe, PEGGY HIRT, JOHN HIRT, SUSAN MALLORY, GEORGE MALLORY, LARRY TYCHSEN, DAWN HUFFMAN, GABOR CSENGODY, PAT CSENGODY, AFOCHA NGOZI IBE, KATHRYN HEIMBURGER, and L. CORBETT HEIMBURGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

ROBERT MCCLINTOCK
Counsel of Record
705 Olive Street
St. Louis, Missouri 63101
(314) 241-5673

MARC D. STERN
15 East 84th Street
New York, New York 10028
(212) 360-1545

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§ 3533.2 at nn. 45-55 5

I. THIS CASE IS NOT MOOT

Well-settled law establishes that mere voluntary cessation of illegal conduct, such as the School District's recent decision to eliminate access for the Scouts between 3:00 and 6:00 p.m., does not moot this case. *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Ladue School District has not permanently abandoned its challenged policy. Rather, as the language of its Resolution makes clear, the District has adopted an interim measure, responding to an interim development in this litigation, while proclaiming an intention to revisit the issue after this Court acts on this Petition.

The interim nature of the Resolution is repeatedly emphasized.[1] Thus, the Resolution announces that the District will petition this Court for review; that the District must in the meanwhile accommodate the ruling of the Eighth Circuit, "pending final disposition of that case" and

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1. The relevant Resolution is reproduced at Appendix I to Respondents' Brief in Opposition.

that the Resolution addresses the deficiency found by the Court of Appeals "pending final disposition of the case." Moreover, that Resolution announces that the District "will review and reconsider the ... Policy ... immediately following the disposition of the lawsuit ...."

Respondents' claim that this action was "voluntary", Brief In Opposition at 9, and *id.* at n.13, and hence is a waiver of the right to seek review here is groundless. The Eighth Circuit had invalidated the District's prior access policy, and refused to stay its judgment pending appeal. The District could continue to enforce that policy only by defying the Court, not an alternative for a school board charged with educating students toward good citizenship.

The District then, had two remaining alternatives, neither of which it would have entertained had it not been for the Eighth Circuit's decision – close the forum entirely (the choice it reluctantly adopted) or open it to any group professing views on the upbringing of children (that would

have been Respondents' choice), but which the District thought would have departed from its duty to children in its care.

The Ladue School Board has not now seen the constitutional light. It has not been through an election, with new members elected on a platform repudiating its prior litigation position. Cf. *Karcher v. May*, 484 U.S. 72 (1987). On the contrary, it has only grudgingly yielded to the command of a divided appeals court.

There is no doubt that there is now a live controversy remaining between the parties. The District insists that it can grant access to the Scouts but not to Respondents. The Respondents deny the District may do so.

There is likewise no doubt that a decision of this Court will affect the rights of the parties in tangible ways. If the Petitioners' position is upheld, they will revert to the

former policy abandoned only under compulsion.[2] If the Respondents' position is upheld, the District will have to decide whether it wishes to permanently exclude popular scout and athletic programs from its facilities between 3:00 and 6:00 p.m., a very different question for an elected school board than the question of whether it will exclude those groups for a few months while a Petition for Certiorari is pending.

Maher v. Roe, 432 U.S. 464, 468, n.4 (1976) is dispositive. There, this Court refused to dismiss as moot an appeal of a decision invalidating a state welfare regulation, when, in response the decision appealed from, an interim regulation was adopted. This Court reasoned that the new regulation was only a stop-gap for purposes of interim compliance and hence that the underlying

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2. This case is therefore wholly unlike *Princeton University v. Schmid*, 455 U.S. 100 (1982) which challenged regulations amended while the case was pending on an as-of-right appeal, where the prior regulations had been upheld in the lower courts,

appeal was not moot. Accord, *Norfolk & W. Ry Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 n.3 (1991); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 791, n.1 (1985). See 13A C.A. Wright, A.R. Miller and E.H. Cooper, Federal Practice & Procedure, § 3533.2 at nn. 45-55.

The Respondents' suggestion of mootness amounts to a claim that in any case in which Petitioner is denied a stay of mandate, and complies with the challenged decision, it has mooted the lawsuit. This is to make the stay-of-mandate decision determinative of the right to seek review in this Court. But it is this Court, not the lower courts, which passes on Petitions for Certiorari.[3]

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3. If the Respondents believed that the District's action was not in keeping with the decision of the Eighth Circuit, they could have either sought enforcement of the mandate in the District Court or moved to have the District held in contempt.

II. THE BRIEF IN OPPOSITION ONLY SERVES TO UNDERLINE THE NEED FOR REVIEW IN THIS COURT

A. Does Viewpoint Discrimination Require A Showing of Animus?

Respondents acknowledge that the Eighth Circuit did not find that the District acted out of animus directed against their religious speech. Indeed, the District Court specifically found that the District had no such motive, and that finding was not held to be clearly erroneous. [Brief in Opposition at 15-16.] They insist that they need no such proof, that it is enough if the decision was traceable to concerns about the Club's activities. [Brief in Opposition at 18-21.]

Petitioner agrees that the decision to change the policy regarding access can ultimately be traced to complaints about the Club. [Cert. Petition at 14.] The legal dispute between the parties (and between the majority and dissent in the Court below) is whether that fact as a matter of law inevitably and necessarily

establishes a case of viewpoint discrimination without regard to a motive to squelch a particular viewpoint. Petitioners submit that *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985)* hold that it does not. Respondents disagree.

Most telling of all against Respondent's position is *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), a case relied on in the Petition. There, complaints against a specific band about the volume of its (political) concerts in New York City's Central Park, led the Parks Department to promulgate new rules governing the production of park concerts. Those rules, like the rules here, were without doubt traceable to complaints about the band's political speech. That did not lead to invalidation of the rules.

Citing cases from very different areas of free speech law, see, *e.g. City of Cincinnati v. Discovery Network*, 113 S.Ct. 1505 (1993) [Brief in Opposition at 22-23], Respondent denies that *mens rea* is a *sine qua non* of a free speech claim. But that submission collapses the distinction drawn in *Cornelius* between permissible subject matter distinction and impermissible viewpoint discrimination into incoherence. Respondents' monochromatic, one-standard-fits-all approach to the First Amendment is stultifying.

But we stray from the limited purposes of this brief. Perhaps on full briefing and oral argument Respondent will persuade this Court that it should discard *mens rea* in all First Amendment (free speech? free exercise? free press?) cases. But since as noted several cases would have to be overruled to reach that result, a demonstration of

why this case should be reviewed by this Court case flows naturally from Respondents' Brief in Opposition.

B. Is Lamb's Chapel Dispositive?

For Respondents, *Lamb's Chapel v. Center Moriches U.F.S.D.*, 113 S.Ct. 2141 (1993) is wholly dispositive of this case. There is no gainsaying the importance of *Lamb's Chapel* to the ultimate resolution of this case. But *Lamb's Chapel* presents the obverse of this case. There, all groups but the religious ones were admitted to the (arguably) non-public forum.[4] Here, all but scout (and athletic) groups were excluded.[5]

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4. Indeed, access was so broad that this Court expressed doubt that it was non-public forum altogether. 113 S.Ct. at 2146.

5. Respondents are inconsistent in their attitude toward the athletic groups. In the courts below they did not ague that they were comparable to athletic clubs for purposes of assessing reasonableness of their exclusion from a non-public forum. Yet when they want to impress this Court with the number of meetings held in the 3:00-6:00 p.m. period,-they count athletic events. [Brief in Opposition at 13.] Respondents cannot have it both ways.

That the Club was religious proved only that it was not a scout or athletic program. So would the fact that it was a stamp club, scuba diving club, a history of the Supreme Court club, or a ballroom dancing club. Religious speech was not the target of the District's rule.

Perhaps this ultimately is not a sufficient distinction between this case and *Lamb's Chapel*. If it is not, then *Perry Educ. Ass'n v. Perry Local Educ. Ass'n, supra*, in which some groups were granted access and some were not, and in which no viewpoint discrimination was found, is likewise wrongly decided.[6]

Again, the point is not whether Petitioners' or Respondents' view of the law is sounder, but whether the issues are sufficiently in doubt and sufficiently important to merit review here. We submit that, far from

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6. Respondents' case is, on their own terms, not strengthened because their speech is religious, and the speech at issue in *Perry* involved economic conditions in the workplace. To draw such a distinction would be to practice viewpoint discrimination.

diminishing the importance of the issue, Respondents' invocation of *Lamb's Chapel* in ways that bring it into conflict with *Perry* (and *Cornelius*) – an approach adopted by the Eighth Circuit – underscores the need for review by this Court.

III. THE ESTABLISHMENT CLAUSE QUESTION IS OPEN

Respondents' Establishment Clause arguments add little to the points made in the Petition. We note only that Respondent assigns talismanic effect to the fact that their religious speech is nominally private and hence, they claim, wholly outside the purview of the Establishment Clause. There is no point in repeating the arguments for or agains Respondents' proposed rule of law. It is sufficient to note that this proposition was sufficiently uncertain in the public forum context, to merit this Court's review in *Capital Square Review Board v. Pinette*, 94-780. It is no less important and no less difficult – indeed, it is

more difficult – in this non-public forum context. At the very least, this case should be held for *Pinette*.

CONCLUSION

A writ of certiorari should be granted.

Robert McClintock
Counsel of Record
705 Olive Street
St. Louis, MO 63101
(314) 241-5673

Marc D. Stern
15 East 84th Street
New York, NY 10028
(212) 360-1545

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